Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

AARON LOCKLEAR,

Petitioner,

v.

BERGMAN & BEVING AB; LUNA AB,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 28, 2006

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QUESTION PRESENTED

Whether under Fed. R. Civ. P. 15(c), the plaintiff's lack of knowledge of the identity of the proper defendant was intended to constitute a "mistake" that would allow an amended complaint substituting the name of the proper defendant after the expiration of the statute of limitations to relate back to the date of the original complaint and avoid being time barred by the statute of limitations.

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Petitioner Aaron Locklear, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was entered on August 7, 2006, and is reported at 457 F. 3d 374 (4th Cir. 2006), and is reprinted in the Appendix to this Petition ("Pet. App.") at App. B at 3a. The memorandum opinion and order of the United States District Court for the District of Maryland was entered on October 29, 2004, and is reported at 224 F.R.D. 377 (D. Md. 2004) and is reprinted at in the Appendix to this Petition (Pet. App.) at App. C at 15a.

JURISDICTION

The Fourth Circuit Court of Appeals entered its decision on August 7, 2006 and Petitioner's motion for reconsideration was denied on September 1, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The District Court of Maryland had subject matter jurisdiction pursuant to 28 U.S.C. § 1332 and the Fourth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

No constitutional provisions are involved in this petition. This case involves the conflicting interpretations of Fed. R. Civ. P. 15(c) among the circuits in the United States Courts of Appeals.

STATEMENT OF THE CASE

The important question raised by the decision below is whether under Fed. R. Civ. P. 15(c)(3)(B), the mistake requirement is satisfied in a situation where a plaintiff lacks the knowledge of the identity of the proper defendant. The Fourth Circuit in this case held that when a plaintiff lacks the knowledge of the identity of the proper defendant, that it cannot constitute a mistake under Rule 15(c)(3)(B) and thus a plaintiff cannot have his amended complaint substituting the proper name of the defendant relate back to the date of the original complaint to avoid being time barred by the statute of limitations. This Court has yet to rule on this issue, but a clear and acknowledged split among the Courts of Appeals has raised an issue of national importance that demands the attention of this Court.

The Fourth Circuit in this case has jumped on the bandwagon of other courts in its mischievous interpretation of Fed. R. Civ. P. 15(c)(3)(B). The Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits all have decided that "lack of knowledge" does not qualify as a mistake under Rule 15(c). However, these courts have merely cited to prior cases in their holding and offer no legitimate reasons from their drastic departure from the plain meaning of "mistake" which was clearly defined by the First Circuit in *Leonard v. Parry*. *Leonard* stated that a mistake, as defined by *Webster's Dictionary*, includes inadequate knowledge. The First, Second, Third and Eighth circuits (the Ninth Circuit Court of Appeals has yet to rule on this issue, but the District Court of Arizona has sided with these circuits) all hold that "lack of knowledge" is a mistake under Rule 15(c) and instead focus their analysis of Rule 15(c)(3)(B) on its notice requirement. The Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh circuits refuse to acknowledge the analysis provided by the

First Circuit in *Leonard*, because several of these courts cite to *Wilson v. United States*, and infer that the First Circuit supports their holding. However, *Leonard* clearly holds to the contrary and distinguishes *Wilson* because *Wilson* did not allow relation back based on a mistake of law, not lack of knowledge of the identity of the proper defendant. These courts also rely upon *Wood v. Worachek*, but in the *Wood* opinion, there is a clear error in its support of its holding because it states that *Sassi v. Brier* holds that "lack of knowledge" does not constitute a mistake, however *Sassi* held to the contrary and the pinpoint citation in the Wood case to the holding in *Sassi* cites to a page that the *Sassi* opinion is not located on. *Leonard* was correct that courts that have held that "lack of knowledge" is not a mistake under Rule 15(c), have simply "glossed over the text" of the rule.

Courts have used this misinterpretation of Rule 15(c) as a judicially created device to dismiss lawsuits before they can even be decided on the merits. As a result, plaintiffs in identical situations can have different outcomes based on the circuit in which they are in. A plaintiff in the Fourth circuit would not be able to amend his complaint to substitute the proper name of the defendant, even if the defendant has notice that he was the proper party to the suit. However, that same plaintiff, if he were in the Third circuit, would be allowed to amend his complaint and proceed to have the case decided on the merits. Such a judicially created loophole to the Federal Rules of Civil Procedure would allow lawsuits to be decided on a mere technicality and not on the merits, which is contrary to what this Court has held in *Forman v. Davis* and *Conley v. Gibson*.

A. Factual Background

On December 20, 1999, Aaron Locklear (Petitioner), a citizen of Maryland, was seriously injured in an industrial accident during the course of his employment at Maryland Plastics, Inc. in Aberdeen, Maryland. He was severely injured when his right hand was "degloved" when it was caught in a metal fabrication machine which he was operating.

Petitioner filed a worker's compensation claim against his employer Maryland Plastics. The case was litigated under Maryland's Labor & Employment Act § 9-902. Petitioner was required, under Maryland Law, to acquire authorization from the owner of the worker's compensation case to initiate litigation against a third party. This exclusive right extended two months post any award or compensation of benefits unless authorization to sue a third party was granted by the insurer or employer. The worker's compensation claim was settled in January of 2003, after the expiration of Maryland's Statute of Limitations for strict liability and negligence. Petitioner received explicit authorization to pursue his claim against a third party approximately three weeks prior to the expiration of the Statute of Limitations in Maryland. Petitioner relied heavily on the labeling of the machine for the name of the manufacturer. The labeling contained a serial number (#954), a product number (Type IP110/5) and the name "Hassleholms". Petitioner reasonably believed "Hassleholms" to be the manufacturer of the machine based on the labeling. Petitioner attempted to verify "Hassleholms" as the manufacturer by searching the registered corporations in Maryland, but "Hassleholms" was not a registered corporation in Maryland.

B. Proceedings Below

Petitioner filed his original complaint before the expiration of the Statute of Limitations in the District Court for the District of Maryland for negligence and strict liability of manufacture and design against "Hassleholms Mekansik AB", a Hassleholms Wire Roller Machine identified by serial number, and an unknown seller, distributor and importer of that machine identified as "John Doe" defendants. Petitioner based his complaint upon the labeling of the machine, which included a serial number, Petitioner stated at the time of the filing of the complaint that he would serve the defendant with the summons at a later date. Due to a temporary tolling provision in Maryland governing worker's compensation claims, the statute of limitations expired on or about February 20, 2003. "Hassleholms" was not served within the 120-day period required for service by Fed. R. Civ. P. 4(m), but the district court, on April 30, 2003, acted *sua sponte* and extended Petitioner's service of process period to September 17, 2003.

On September 4, 2003, Petitioner filed a motion requesting nine additional months to serve the defendant because he had only recently discovered that Luna, AB and Bergman & Beving, AB, were in fact the manufacturers of the machine, and not "Hassleholms", because "Hassleholms" turned out to be the city where the manufacturer was located and Petitioner needed time to discover the international location of the manufacturer in order to effectuate proper service. The court granted the Petitioner's motion and Petitioner discovered that the company that manufactured the machine, MekanLuna AB, was a wholly owned and now defunct subsidiary of Bergman & Beving, AB and Luna, AB, both Swedish corporations. Luna, AB is a wholly owned subsidiary of Bergman & Beving, AB and is the intermediary

holding company for the tools and machinery division of Bergman & Beving, AB. Petitioner subsequently asked the court for permission to amend its complaint to replace Hassleholms with Berman & Beving, AB and Luna, AB and for an extension of service. The court granted Petitioner's request and extended the time for service until June 17, 2004. The amended complaint was filed on October 9, 2003.

The court issued a summons to serve Bergman & Beving, AB and Luna, AB on March 26, 2004. On May 4, 2004, Petitioner's counsel filed its Motion for Extension Time for time to effectuate service due to the time consuming and intricate laws for serving process under the Hague Convention. On May 5, 2004, the court executed and order granting Petitioner's motion on or before November 17, 2004. Petitioner effectuated service on Bergman & Beving, AB on May 10, 2004 and Luna, AB was served three days later. On June 8, 2004, Bergman & Beving, AB and Luna, AB filed a motion to dismiss on the basis that Petitioner added new parties to its amended complaint and that the amended complaint did not relate back to the original complaint under Fed. R. Civ. P. 15(c) and was thus barred by Maryland's three-year Statute of Limitations.

On October 29, 2004, the court granted Respondent's Motion to Dismiss. The District Court ruled that the amended complaint did not relate back to the original complaint because the court viewed Petitioner's changing the parties from "Hassleholms" to the correct party as adding new defendants and that the Petitioner's "lack of knowledge" of the proper defendant did not constitute a "mistake" that would allow relation back under Fed. R. Civ. P. 15(c)(b). The District Court held that naming "Hassleholms" as the defendant was no different than naming a "John Doe" defendant because the District Court views both scenarios as

the plaintiff lacking knowledge of the proper party. The District Court limited its application of "mistakes" in naming parties to "a mere slip of the pen". The District Court also held that the Petitioner did not satisfy Fed. R. Civ. P. 15(c)(2) because the court viewed the amended complaint as adding new defendants and that the advisory committee's notes (1991 amendment) of Fed. R. Civ. P. 15(c) refer to Fed. R. Civ. P. 15(c)(3) as a "name correcting" amendment that does not apply to the addition of new parties. On November 24, 2004, Petitioner filed its notice to appeal to the United States Court of Appeals for the Fourth Circuit.

On August 7, 2006, the United States Court of Appeals for the Fourth Circuit affirmed the District Court of Maryland's decision. The court affirmed the decision of the District Court, but only answered one of two issues ruled on by the District Court. The court affirmed the District Court's ruling that Petitioner's "lack of knowledge" of the proper party did not constitute a mistake under Fed. R. Civ. P. 15(c)(3) and that since there was no mistake, that the amended complaint did not relate back to the original complaint and thus, the amended complaint was barred by the Statute of Limitations. However, the court did not reach the second issue as to whether Petitioner effectively served Respondents under Fed. R. Civ. P. 15(c) and Fed. R. Civ. P. 4(m) and the District Court's ruling that service was not effective under Fed. R. Civ. P. 15(c) because Petitioner added parties and did not correct a name of a party. Petitioner filed a Motion for Reconsideration to the United States Court of Appeals for the Fourth Circuit, but the rehearing was denied on September 1, 2006.

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring conflict among the Courts of Appeals as to the definition of the word "mistake" in Fed. R. Civ. P. 15(c)(3)(B) and whether the definition should include the "lack of knowledge of the proper party". A clear and irreconcilable conflict is apparent among the Courts of Appeals as to whether the "lack of knowledge of the proper party" constitutes a mistake under Fed. R. Civ. P. 15(c)(3). This Court should grant certiorari to resolve this conflict as the consequences of the continuing conflict among the circuits would have severe, debilitating, and inequitable consequences to future plaintiffs in indentical cases because each plaintiff's right to amend a complaint after the expiration of the Statute of Limitations and have it relate back to the date of the original complaint under Fed. R. Civ. P. 15(c)(3) may be dependent on the circuit in which the plaintiff is in, and not the facts of the case. The current conflicting state of interpretation among the Courts of Appeals is an issue of national importance because the Federal Rules of Civil Procedure are not being applied equally among the Courts of Appeals and the Advisory Committee on Civil Rules has refused to resolve this conflict.

I. There is an irreconcilable conflict among the courts of appeals as to whether, under Fed. R. Civ. P. 15(c), a plaintiff's lack of knowledge of the proper party constitutes a "mistake" that would allow an amended complaint after the expiration of the statute of limitations substituting the proper party to relate back to the original complaint and avoid being time barred by the statute of limitations.

When a party seeks to change the name of a party in a pleading, Fed. R. Civ. P. 15(c) states that an amendment to

a pleading relates back to the date of the original pleading when:

> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, and
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the proper party.

In this case, the Fourth Circuit adopted the view set forth in *Western Contracting Corp. v. Bechtel Corp.*, which adopted the Seventh Circuit's holding in *Wood v. Worachek*, that "Rule 15(c)(2)[1] permits an amendment to relate back where that party is chargeable with knowledge of mistake, but it does not permit relation back where, as here, there is a lack of knowledge of the proper party." *Locklear v. Bergman & Beving, AB*, 457 F. 3d 363 (4th Cir. 2006) (quoting *Western Contracting Corp. v. Bechtel*, 885 F. 2d 1196, 1201 (4th Cir. 1989); *Wood v. Worachek*, 618 F. 2d 1225, 1230 (7th Cir. 1980)). The court also cited the First Circuit case of *Wilson*

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[1] Rule 15(c)(3) was numbered 15(c)(2) when *Bechtel* and *Wood* were decided.

v. United States, which also quoted the *Wood* case in stating that a mistake does not relate back where there is a lack of knowledge of the proper party. *Id.* (quoting *Wilson v. United States Gov't*, 23 F. 3d 559, 563 (1st Cir. 1994); *Wood*, 618 F. 2d at 1230).

However, the Fourth Circuit seems to have its own interpretation of the advisory committee's notes to the 1991 amendments to Rule 15(c). The Fourth Circuit seems to think that the committee's notes "lend support to the conclusion that "mistake" under subsection (3)(B) is distinguishable from a lack of knowledge of the proper defendant to be sued." *Id* at 8. However, even in District Judge Floyd's opinion in this case, he notes that the committee noted, " If the notice requirement is met within the Rule 4(m) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification." *Id.* Nowhere in Rule 15(c) or the notes by the advisory committee is the phrase "lack of knowledge" mentioned, nor is there any analogous phrase that would infer that the committee clearly defined whether "lack of knowledge" should included in the definition of "mistake" under Rule 15(c)(B).

The Fourth Circuit has seemed to only look at one side of the "lack of knowledge" debate among the courts. Other courts have come to a different conclusion that the "lack of knowledge" of the proper party is a mistake and that relation back is permissible when the other requirements of Rule 15(c) are met. These courts seem to focus on the fact that the defendant should have notice of the suit, and that so long as there is some mistake in the pleading, that relation back is permitted when the notice requirement of Rule 15(c) is met.

In *Heinly v. Queen*, the Third Circuit permitted relation back when the plaintiff filed a section 1983 claim against the

Pennsylvania State Police, a police captain and several John Doe officers. *Heinly v. Queen*, 146 F.R.D. 102 (E.D. Pa. 1993), *aff'd mem.*, 26 F. 3d 122 (3d Cir. 1994). In *Heinly*, the plaintiff did not know the identity of the John Doe officers, but relation back was permitted because the defendants had notice of the suit because the defendants' attorney received notice of the suit. *See Id.*

Heinly was followed by the well-known case of *Singletary v. Pennsylvania Dept. of Corr.*, 266 F. 3d 186 (3d Cir. 2001). *Singletary* held that the plaintiff's complaint did not relate back because the notice requirement was not met, however there was a strong opinion from Judge Becker that recommended to the Advisory Rules Committee that Rule 15(c)(3) be modified to allow "lack of knowledge" to constitute mistake by incorporating the phrase "or lack of information". *Id.* Judge Becker considers the argument against allowing "lack of knowledge" to constitute a mistake from other circuits where other courts are concerned about defendant's having a lawsuit spring upon them well after the expiration of the statute of limitations. *Id.* However, Judge Becker quashes that argument because he states that the other requirements of Rule 15(c)(3) must also be met to allow relation back and that these other requirements provide fairness to the defendant if met. *Id* at 201.

In *Fludd*, the Plaintiff alleged a violation of his Fourth Amendment rights and assault against United States Secret Service Agents. *Fludd. v. United States Secret Svc.*, 102 F.R.D. 803 (Dist. DC 1984). The Plaintiff originally filed his suit against agents that were listed as "John Does" and then amended his complaint once he learned of the proper names of the agents. *Id.* The court held that the amended complaint related back because the original complaint described the incident with specificity, described the

defendants with specificity, the attorneys for the defendants were timely served and that the Secret Service knew who the agents were, that the defendants had notice of the suit and that the plaintiff's lack of knowledge of the identity of the defendant's did not prevent relation back. *See id.*

In *Soto*, the Plaintiff brought a Section 1983 action against corrections officers for injuries sustained while he was in jail, but was unable to name the officers in his original complaint because and sought to leave to amend his complaint to add the officers. *Soto v. Brooklyn Corr. Facility*, 80 F. 3d 34 (2nd Cir. 1996). The District Court for the Eastern District of New York denied the Plaintiff's motion to amend his complaint and on appeal, the Second Circuit reversed, citing that the Plaintiff's failure to name the officers met the mistake requirement under Fed. R. Civ. P. 15(c). The Second Circuit's reasoning was that the officers knew the law and their possible liability and thus focused on the notice requirement of Rule 15(c) and did not even mention "lack of knowledge" of the proper party as not being a mistake. *See id.* In *Soto*, the court instead liberally construed the meaning of mistake and focused on whether the defendants had notice of the suit and but for a mistake by the plaintiff, that they would have been named in the original complaint and thus remanded the case, since the district court did not rule on the notice issue. *See id.* The Second Circuit did state that if any of the officers did receive notice and would not be prejudiced in raising their defenses, that relation back should be permitted on remand. *See id* at 37.

In *Leonard*, the First Circuit states that several courts have been influenced by a "mischievous bit of dictum" and have glossed over the text of Fed. R. Civ. P. 15(c). *Leonard v. Parry*, 219 F. 3d 25 (1st Cir. 2000). The Plaintiff in *Leonard* was involved in an automobile accident and sued the

owner of the car that hit him, which turned out not to be the same person that was driving the car. *Id.* The First Circuit held that relation back was permitted to change the defendant to the driver of the car at the time of the accident, which was not the actual owner of the car. *Id.* The court interpreted a plain meaning of Rule 15(c) in that the lack of knowledge of the proper defendant was a mistake and even relied upon *Webster's Ninth New Collegiate Dictionary* for the definition of "mistake" which states that a mistake is a "wrong action or statement proceeding from faulty judgment, inadequate knowledge, or inattention". *See id* at 28 (quoting Webster's Ninth Collegiate Dictionary 760 (1983)). The court then went on to state that "[v]irtually by definition, every mistake involves an element of negligence, carelessness, or fault – and the language of Rule 15(c)(3) does not distinguish among the types of mistakes concerning identity". *Id* at 29. The court further states that "Rule 15(c)(3) requires courts to ponder whether, in a counterfactual error-free world, the action would have been brought against the proper party, not whether the action should have been amended subsequently to include that party. *Id.* at 29 (citing Fed. R. Civ. P. 15 advisory committee's note (1966 amendment)).

The advisory committee's note to the 1966 amendment to Rule 15 explained that the appropriate question is whether the proper party "knew or should have known that the action would have been brought against him initially had there not been a mistake concerning identity. *See* Fed. R. Civ. P. 15 advisory committee's note (1966 amendment). The First Circuit in *Leonard* uses this note to come to the conclusion that "what the plaintiff knew or (thought he knew) at the time of the original pleading generally is relevant datum in respect to the question of whether mistake concerning identity actually took place. *Leonard*, at 29 (quoting *Wells v. HBO & Co.*, 813 F. Supp. 1561, 1567 (N.D. Ga. 1992) ("Even the

most liberal interpretation of 'mistake' cannot include a deliberate decision not to sue a party whose identity plaintiff knew from the outset.")). *Leonard* also states that "what the plaintiff knew or should have known and what he did or should have done are relevant to the question of whether justice requires leave to amend under this discretionary provision. *Id* at 30 (citing *Forman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962).

The Eighth Circuit has held that the purpose of Rule 15(c) is to permit cases to be decided on the merits. *See Alpern v. Utilicorp United, Inc.*, 84 F. 3d 1525 (8th Cir. 1996); *See also Gridley v. Cunningham*, 550 F. 2d 551, 553 (8th Cir. 1977). In *Roberts*, the plaintiff brought a sexual harassment claim against her employer and sought to amend the complaint after the expiration of the statute of limitations to change the defendant to her co-worker. *Roberts v. Michaels*, 219 F. 3d 775 (8th Cir. 2000). The court allowed the plaintiff to amend her complaint because the proper defendant had received notice of the suit and knew that it was the proper party, even though it had not been named in the suit and thus the plaintiff had met the requirements of Rule 15(c)(3). *Id* at 779. The court held that the plaintiff was not illogical in assuming that the proper name of the defendant was a fictitious name created by the defendant corporation, even though a more thorough inquiry would have revealed the true name of the defendant corporation. *Id*. The Eighth Circuit in the *Roberts* case did not even mention the notion of a mistake by the plaintiff in the pleading but rather focused on whether the defendant had notice that but for a mistake concerning the proper party by the plaintiff, that it would have been named in the pleading. *See id.*

In the Ninth Circuit, the court of appeals has yet to decide this issue. But, in *Centuori*, the District Court of Arizona sided on the liberal interpretation of "mistake" under Rule 15(c) based on the reasoning set forth in the *Leonard* case in the First Circuit since prior case law in the Ninth Circuit had yet to discuss the Rule 15(c)(3) requirements. *See Centuori v. Experian Info. Solutions, Inc.*, 329 F. Supp. 2d 1133 (D.C. Ariz. 2004).

The First, Second, Third and Eighth Circuits have sided on the liberal interpretation of the mistake clause under Rule 15(c)(3). The cases that come out of these circuits permit mistake liberally and instead focus on the notice requirement of Rule 15(c)(3), which requires that the defendant know or should have known that but for a mistake concerning the proper party, that it would have been named as a defendant in the original pleading. The decisions in these circuits seem to fall in line with the view that the purpose of Rule 15(c) is to allow amendments of pleadings where the proper defendant knew or should have known that he was the proper party in the pleading and thus could prepare an adequate defense to the suit.

However, the Courts of Appeals that interpret "lack of knowledge" as not being a mistake under Rule 15(c)(3), simply dismiss the suit without even considering whether defendant knew or should have known that he was the proper party to the suit. It seems almost that these courts use the mistake clause as a device lighten their load of cases instead of allowing cases to proceed and to be decided on the merits. As the court in *Leonard* said referring to the circuits that do not interpret mistake under Rule 15(c)(3) literally and liberally, "some courts, spurred by a mischievous bit of dictum, have glossed over the text of the rule(15(c)(3))." *Leonard*, at 27.

Starting with the Fourth Circuit's opinion in *Locklear*, it is important to see where exactly the courts that do not consider "lack of knowledge" a mistake under Rule 15(c)(3), get their reasoning from and the rationale behind it. In *Locklear*, the court cites several cases in support of its position. However, a close analysis of these cases confirms that the courts that have taken the opposite view of the court in *Leonard*, have relied upon that same "mischievous bit of dictum" that provides little, if any rationale behind a drastic departure from the plain meaning of Rule 15(c). The court in *Locklear* relies upon *Bechtel*, the leading Fourth Circuit case decided in 1989 where the court merely cites the reasoning from the *Wood* case, which only states that the lack of knowledge of the proper party is not a mistake, but provides no rationale or analysis. *See Bechtel* at 1201 (quoting *Wood* at 1230). *Bechtel* in that same quote cites *Norton v. Int'l Harvester Co.*, 627 F 2d 18, 22 (7th Cir. 1980), but in *Norton*, the court merely does the same thing as *Bechtel*, it just merely quotes *Wood*, without providing analysis or rationale for their reasoning. *Norton* does acknowledge that in *Williams v. Avis Transport, Inc.*, 57 F.R.D. 53 (D.C. Nev. 1972), the court followed a liberal interpretation of "mistake", but only states that it refuses to follow that holding and does not provide the analysis or rationale for doing so.

In *Wood*, the Seventh Circuit does not provide any rationale or analysis of its holding, but instead cites its incorrect interpretation of the holding in *Sassi v. Brier*, 584 F. 2d 234 (7th Cir. 1978). *Wood* at 1230. *Wood* decides to use this device to dismiss the amended complaint without even reaching the issue of notice in the case. *Id.* In *Sassi*, the case involved a Section 1983 claim where the plaintiff named "John Doe" defendants in its original complaint and sought to amend after the expiration of the Statute of Limitations to

include the proper names of the officers. *Sassi v. Brier*, 584 F. 2d 234 (7th Cir. 1978). In *Sassi*, Judge Wood states:

> "However, there is nothing in the record to offset the affidavits of the newly named defendants to show that within the statute of limitations those defendants had received any type of notice, or knew or should have known that but for mistake or even lack of knowledge of their identities that the newly named defendants would have been named as original defendants."

This virtually states that the lack of knowledge of the proper party is in fact a mistake under Rule 15(c). He then states that naming a "John Doe" party constitutes a change in parties under Rule 15(c). *Id* (citing *Varlack v. SWC Caribbean, Inc.*, 550 F. 2d 171, 174 (3d Cir. 1977); *Craig v. United States*, 413 F. 2d 854 (9th Cir.), *cert. denied*, 396 U.S. 987, 90 S. Ct. 483, 24 L. Ed. 2d 451 (1969)). According to *Sassi*, not only is the lack of knowledge of the proper party a mistake under Rule 15(c), but the substitution of the proper party for a "John Doe" party also allows an amended pleading to related back under Rule 15(c) as long as the other requirements of Rule 15(c) were met. What is even more troubling is that *Wood* incorrectly cited *Sassi* as being on page 236, when it is only on pages 234 and 235 in volume 584, and the very bit of dictum that *Wood* relies on in *Sassi* does not even exist. *Wood* incorrectly states the law laid forth in *Sassi* because the holding in *Sassi* was that since the defendants did not receive proper notice of the suit, that the amended complaint did not relate back. *See Sassi* at 234. *Sassi* actually states that a lack of knowledge in fact is a mistake. *See id* at 235. Thus, the entire rationale behind the holding in *Wood* is completely without merit.

The Circuits that have held that the "lack of knowledge of the proper party" does not constitute mistake under Rule 15(c), simply do not understand the rule and have poorly relied upon questionable case law to support their conclusions. The Fourth Circuit in *Locklear* also relies on *Wilson v. United States*, 23 F. 3d 559 (1st Cir. 1994), in its support of its position on the mistake provision of Rule 15(c)(3)(B). However, what the Fourth Circuit failed to do was carefully read *Wilson* because the court in *Wilson* did not allow relation back because the plaintiff changed the cause of action, not because the plaintiff sought to add new defendants. *See Wilson*; *See also Leonard* at 31(distinguishing *Wilson*). Although the plaintiff in *Wilson* did seek to add new defendants, the court did not state that was the rationale behind denying relation back. The Fourth Circuit also did not do their homework on the *Wilson* case because clearly the *Leonard* case, decided after *Wilson*, ruled that the "lack of knowledge" by the plaintiff did constitute mistake under Rule 15(c)(3)(B). *Leonard* distinguishes its case from *Wilson* by clearly stating that *Wilson* did not allow relation back because the plaintiff sought to change the cause of action, while *Leonard* provided sufficient reasoning (*see supra*), as to why the "lack of knowledge" by the plaintiff is a mistake and thus allows relation back.

In *Locklear*, the Fourth Circuit also relies upon *Jacobsen v. Osborne*, 133 F. 3d 315 (5th Cir. 1998), in supporting its position that lack of knowledge is not a mistake. In *Jacobsen*, the court relies upon *Barrow v. Wethersfield Police Dept.*, 66 F. 3d 466 (2d Cir. 1995), in support of its position that lack of knowledge is not a mistake. *Jacobsen* at 321. However, *Barrow* was superseded by *Soto v. Brooklyn Corr. Facility*, 80 F. 3d 34 (2d Cir. 1996), which held that the lack of knowledge was a mistake under Rule 15(c) and that a plaintiff could amend his Section 1983 claim to include the real names

of the officers who were previously identified as "John Does". *See Soto*.

Jacobsen also relies upon *Wilson*, which obviously was error because *Wilson* did not address changing parties, but rather involved changing the cause of action and thus the proper and leading First Circuit case on the issue is *Leonard*, not *Wilson*, which is contrary to position in *Jacobsen*. However, *Leonard* was not decided at the time of *Jacobsen*, so the First Circuit had yet to decide this issue at that time. *Jacobsen* also relies upon *Worthington v. Wilson*, 8 F. 3d 1253 (7th Cir. 1993) in supporting is conclusion, but *Worthington* merely relies upon *Wood*, which provided no rationale for its ruling and which incorrectly relied upon *Sassi*, a case that actually contradicts its ruling.

Locklear relies upon *Baskin v. City of Des Plaines*, 138 F. 3d 701 (7th Cir. 2000), which also holds that lack of knowledge is not a mistake, but provides no analysis, just quotes and citations. *Baskin* relies upon the holdings in *Worthington*, *Wood* and *Delgado-Brunet v. Clark*, 93 F. 3d 339 (7th Cir. 1996) in supporting its position. However, *Wood* provides no rationale for its holding and *Worthington* relied on *Wood*, so the same could be said for *Worthington*. *Delgado* relies upon *Sassi*, *Wood* and *Worthington*. *Sassi* is misunderstood and is contrary to the holding in *Delgado* that lack of knowledge is not a mistake and *Wood* and *Worthington* simply provide no rational basis for their holdings. *Baskin*, like many cases that support its position, provides no analysis or rationale for departing from the plain meaning of mistake under Rule 15(c)(3)(B). *Baskin* merely cites prior case law to support its position, but that case law has also failed to adequately support the notion that lack of knowledge is not a mistake.

The Fourth Circuit also relied upon the holding in *Cox v. Treadway*, 73 F. 3d 230 (6th Cir. 1996), the leading case from the Sixth Circuit that supports their position. *Cox* involves a Section 1983 claim case where the plaintiffs sued "John Doe" defendants because they did not know the identity of the police officers that allegedly injured them. *Id. Cox* states that new parties to be added after the statute of limitations has run do not qualify for a mistake in identity under Rule 15(c)(3)(B). *Cox*, at 240. However, *Cox* does not provide rationale for this holding and drastic departure from the plain meaning of the rule, just a mere citation to prior cases. *Cox* cites to *In re Kent Holland Die Casting & Plating, Inc.*, 928 F. 2d 1448, 1449-50 (6th Cir. 1991) and *Marlowe v. Fisher Body*, 489 F. 2d 1057, 1064 (6th Cir. 1973) in stating that substituting named defendants for "John Doe" defendants is not a mistake under Rule 15(c)(3)(B). *In re Kent* does nothing more than cite to *Marlowe* in its opinion and like *Cox*, provides no rationale for its departure from the plain meaning of Rule 15(c) other than a mere citation to a prior case. In *Marlowe*, the court never even discusses the lack of knowledge of the proper party, but rather holds that Rule 15(c) does not permit relation back where the plaintiff seeks to add a new party. *Marlowe*, at 1064.

The Fourth Circuit in this case also relies on *Wayne v. Jarvis*, 197 F. 3d 1098 (11th Cir. 1999) in its plethora of citations that supposedly support the notion that "lack of knowledge of the proper party" is not a mistake under Rule 15(c)(3)(B). The Eleventh Circuit in *Wayne* also does not provide rationale in its holding other than citing prior cases such as *Barrow*, *Jacobsen*, *Cox*, and *Worthington*. As discussed earlier, these cases that *Wayne* relies upon simply do not support the Eleventh Circuit's misinterpretation of Rule 15(c).

Thus, the cases that rely on *Cox* as a leading authority to hold that lack of knowledge of the proper party is not a mistake, are mistaken because the case law that *Cox* relies upon does not hold that lack of knowledge is a mistake, but rather that a plaintiff cannot new parties to a pleading after the expiration of the statute of limitations. This is an important distinction because in "lack of knowledge" cases, the plaintiff intends to sue the defendant, but does not know their proper identity. In cases where a new party is being added to an amended complaint after the expiration of the statute of limitations, there is no mistake of identity because the plaintiff already knows the identity of the party and chooses to add that party in the complaint. The distinction is that the focus on what the plaintiff knew at the time of the filing of the complaint, the identity of the party who may be added to the amended complaint. In "lack of knowledge cases", the plaintiff does not know the identity of the party it is naming in the complaint, but seeks to identify that same party at a later date. In cases where new parties are being added to an amended complaint after the expiration of the statute of limitations, the plaintiff knows who that new party is at the time he filed the original complaint, but chooses not to name that party at that time, possibly for strategic reasons. This is the important distinction that *Leonard* makes in its interpretation of Rule 15(c) because it clearly draws a line between plaintiffs that add new parties in an amended complaint whom they already knew were proper parties from plaintiffs who sought to add or change the name of the proper defendant when the plaintiff intended to sue the proper defendant and did not purposely omit the proper defendant from the original pleading for strategic reasons, but rather did not properly name the proper defendant in the original pleading.

In *Garrett v. Fleming*, 362 F. 3d 69 (10th Cir. 2004), another "John Doe" case involving a corrections officer, the court merely cites the same cases as *Locklear*: *Wayne, Baskin, Jacobsen, Cox, Barrow, Bechtel* and acknowledge the holding in *Singletary*. *See Garrett*. However, *Garrett* does not provide analysis for its holding, just citations, which seems to be the trend in the opinions by the courts that hold that "lack of knowledge" is not a mistake.

The courts that hold that a "lack of knowledge of the proper party" is not a mistake because it constitutes adding a new party simply do not understand the concept of Rule 15(c). Rule 15(c) is intended to allow plaintiff who makes an error in naming a defendant in the pleading to amend their pleading and have it relate back to the date of the original pleading to avoid being time barred by the statute of limitations. Rule 15(c) does not allow plaintiffs to simply name "John Doe" defendants and then take their leisurely time in identifying who that defendant is because it requires that the defendant have notice of the suit within the Fed. R. Civ. P. 4(m) time period for service. This notice requirement essentially provides what the statute of limitations is designed to ensure, that the defendant receive notice that he is being sued and that he is able to adequately prepare a defense to the suit. Thus, Rule 4(m) gives the plaintiff a certain timeframe in which to serve the proper defendant with the summons. If the defendant is not served within the Rule 4(m) period, his amended complaint cannot relate back to the date of the original complaint even if he made a mistake in the pleading.

The courts that have adopted the view that the "lack of knowledge of the proper party" does not constitute mistake have simply used this misinterpretation of Rule 15(c) as a judicially created device that seems to be used by courts to throw out cases before they can even be decided on the

merits. It seems that once one circuit used this device, several other circuits jumped on the bandwagon and glossed over the text of Rule 15(c) without giving thought to what its plain meaning is and why they should depart from it. Further, these courts have refused to give the rationale for departing from the plain meaning of Rule 15(c) and instead decide to heavily cite prior cases in hopes that it adds weight to their holding and that nobody would check the legitimacy of the cases that are cited. It is apparent that there simply is no rationale for holding that a "lack of knowledge of the proper party" does not constitute mistake under Rule 15(c) and these courts have merely used the Federal Rules of Civil Procedure incorrectly and have tailored Rule 15(c) to further their agenda at the expense of several plaintiffs who were unable to proceed to have their cases litigated on the merits.

II. The consequences of the different interpretations of the "mistake clause" under Fed. R. Civ. P. 15(c)(3)(B) by the Courts of Appeals are too important to be ignored.

As this Court said before, "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Forman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that purpose of pleading is to facilitate a proper decision on the merits. *Conley v. Gibson*, 55 U.S. 41, 48, 2 L. Ed. 2d 80, 86, 78 S. Ct. 99 (1957). The Courts of Appeals that find that "lack of knowledge" of the proper party does not constitute a mistake under Rule 15(c) have been using this as a device to dismiss lawsuits on a mere technicality. The Courts of Appeals that do find that "lack of knowledge" of the proper party is a

mistake under Rule 15(c), focus on the issue of whether the proper defendant has received notice that but for the mistake, that he would have been named in the original complaint. Finding that a "lack of knowledge" of the proper party does not constitute mistake is contrary to the plain meaning of the text of Rule 15(c) and allows the proper defendant, who may even have notice of the suit, to use the Federal Rules of Civil Procedure as a game of skill and get the suit dismissed on a technicality, not the merits. Such gamesmanship is contrary to this Court's holding in *Forman* and *Conley* and has severe consequences that amount to an issue of national importance.

III. This Court should rule on this issue because the Civil Rules Advisory Committee has identified that there is an issue with Rule 15(c)(3)(B), but has refused to make a decision.

As outlined in the Appendix to this petition, the Civil Rules Advisory Committee has considered whether an amendment to Rule 15(c)(3)(B) should include an addition of the words "or lack of information" after the word mistake. The Committee, in its last meeting of May 22-23, 2006, decided to remove this issue from their agenda by a 7-5 vote, because they felt that it was only necessary to deal with this issue if there was a clear problem in practice. However, this case in addition to the obvious split among the Courts of Appeals indicates a clear problem in practice because a Federal Rule of Civil Procedure is not being applied uniformly in every jurisdiction. In prior meetings, the Committee has debated the serious issues in practice and the consequences of amending the rule or leaving it untouched. The Committee has struggled to understand this issue and has instead procrastinated in deciding what to do. This issue was first brought to the attention of the Committee in 1998 and again in 2001 by Judge Edward Becker in *Singletary* and has

yet to be decided and it doesn't seem to be apparent that anything will be done to resolve this conflict among the Courts of Appeals by the Committee. The only apparent solution to this issue is a decision by this Court, which would be likely to prompt a change to Rule 15(c)(3)(B), similar to what happened in *Schiavone v. Fortune, Inc.*, 477 U.S. 21, 106 S. Ct. 2379. 91 L. Ed. 2d 18 (1986), when this Court ruled on an issue concerning Rule 15(c), which then prompted the 1991 amendments to Rule 15(c).

For all of the reasons outlined above, this Court should grant petition to correct the Fourth Circuit Court of Appeals' error in misinterpreting Fed. R. Civ. P. 15(c) which precludes relation back of an amended complaint after the expiration of the statute of limitations when a plaintiff lacked knowledge of the identity of the proper defendant at the time of the filing of its original complaint. This court must answer this important and irreconcilable conflict among the courts of appeals as to the proper interpretation of Fed. R. Civ. P. 15(c) that has amounted to an issue of national importance.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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November 28, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-2506

[Filed September 1, 2006]

AARON LOCKLEAR,	)
Plaintiff-Appellant,	)
v.	)
BERGMAN & BEVING AB; LUNA AB,	)
Defendants-Appellees,	)
and	)
HASSLEHOLMS MEKANISK, AB,	)
and or its successor or assign, purchaser	)
or surviving legal entity;	)
A HASSLEHOLMS WIRE ROLLER	)
MACHINE TYPE 1P110/5 SERIAL #:954;	)
UNKNOWN SELLER OF A	)
HASSLEHOLMS WIRE ROLLER	)
MACHINE TYPE 1P110/5 SERIAL #:954;	)
UNKNOWN DISTRIBUTOR,	)
A Hassleholms Wire Roller Machine Type	)
1P110/5 Serial #:954; UNKNOWN	)
IMPORTER, A Hassleholms Wire Roller	)
Machine Type 1P110/5 Serial #:954,	)
Defendants.	)
	)

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Williams, Judge Gregory, and Judge Floyd.

For the Court,

/s/_____

Patricia S. Connor
CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04-2506

[Filed August 7, 2006]

AARON LOCKLEAR,
Plaintiff-Appellant,
v.
BERGMAN & BEVING AB; LUNA AB,
Defendants-Appellees,
and
HASSLEHOLMS MEKANISK, AB,
and or its successor or assign, purchaser
or surviving legal entity;
A HASSLEHOLMS WIRE ROLLER
MACHINE TYPE 1P110/5 SERIAL #:954;
UNKNOWN SELLER OF A
HASSLEHOLMS WIRE ROLLER
MACHINE TYPE 1P110/5 SERIAL #:954;
UNKNOWN DISTRIBUTOR,
A Hassleholms Wire Roller Machine Type
1P110/5 Serial #:954; UNKNOWN
IMPORTER, A Hassleholms Wire Roller
Machine Type 1P110/5 Serial #:954,
Defendants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
(CA-02-4087-1-JFM)
J. Frederick Motz, District Judge

Before WILLIAMS and GREGORY, Circuit Judges, and Henry F. FLOYD, United States District Judge for the District of South Carolina, sitting by designation

OPINION

FLOYD, District Judge:

Aaron Locklear (Locklear) brings this appeal, asserting that the district court erred when it dismissed his action against Luna AB (Luna) and Bergman & Beving AB (Bergman). The district court held that the suit was time-barred because the amended complaint, naming Luna and Bergman for the first time, did not relate back to the original complaint pursuant to Fed. R. Civ. P. 15(c)(3).

Locklear contends that the amended complaint relates back to the original complaint because Luna and Bergman were properly substituted for a mistakenly-named defendant and effectuated with service within a court-granted extension as set forth by Fed. R. Civ. P. 4(m).

We disagree and, for the reasons set forth below, affirm the judgment of the district court.

I.

The parties agree on most of the facts relevant to this appeal. On December 20, 1999, Locklear's right hand became "degloved" while operating a metal fabrication

machine during the course of his employment at Maryland Plastics, Inc. in Aberdeen, Maryland. (J.A. at 113.) Maryland's three-year limitations period covering tort claims applies to this case; however, due to a temporary tolling provision governing worker's compensation claims, the statute of limitations expired on or about February 20, 2003. Md. Code Ann., Labor and Employment § 9-902 (1999); J.A. at 115.

Locklear filed his original complaint on December 17, 2002, with the United States District Court for the District of Maryland. The original complaint named as defendants (1) Hassleholms Mekanisk AB (Hassleholms); (2) a Hassleholms Wire Roller Machine identified by serial number; and (3) "John Doe" defendants for the unknown seller, distributor, and importer of the machine. (J.A. at 6-7, 113.) At the time of Locklear's original filing, he stated that service of the summons would occur "at a later date." (J.A. at 14.) Locklear did not serve Hassleholms, the originally named defendant, within the 120-day period required by Fed. R. Civ. P. 4(m); however, on April 30, 2003, the district court, acting *sua sponte*, extended Locklear's service of process period to September 17, 2003. (J.A. at 14.)

On September 4, 2003, Locklear filed a motion requesting nine additional months in which to effectuate service. (J.A. at 15.) As the basis for his request, Locklear informed the court that he had only recently discovered that Luna and Bergman were the correct manufacturers of the machine and that Hassleholms, the originally-named defendant, was merely the city where the manufacturer was located. (J.A. at 15-16, 18.) The district court granted the motion, ordering that service be effected upon Luna and Bergman on or before June 17, 2004, and directed that an amended complaint be filed on or before October 10, 2003. (J.A. at 19.)

On October 9, 2003, Locklear filed his amended complaint, replacing the previously-named Hassleholms with newly-named Defendants Luna and Bergman. (J.A. at 20.) Locklear first contacted Luna and Bergman via electronic mail messages sent to their corporate officers on February 20, 2004. (J.A. at 53, 55.) On March 26, 2004, summonses were issued for Luna and Bergman, and process was served on Bergman and Luna on April 27, 2004, and April 28, 2004, respectively.

Luna and Bergman subsequently moved to dismiss the complaint on the grounds that Locklear's action was barred by Maryland's three-year statute of limitations and that they were not subject to personal jurisdiction in Maryland. The district court, without reaching the jurisdictional issue, granted the motion, holding that it failed to relate back to the original complaint pursuant to Fed. R. Civ. P. 15(c)(3). This appeal followed.

II.

The issue before us is whether an amended complaint filed after the statute of limitations expired but during a court-ordered extension of time for service of process, which adds a new party in place of a mistakenly-named party, relates back to the original complaint pursuant Fed. R. Civ. P. 15(c)(3). We review the district court's analysis of this question of law *de novo*. *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002).

As already observed, under Maryland law, Locklear's products liability claim against Luna and Bergman is subject to a three-year statute of limitations (subject to extension under the worker's compensation scheme), which expired on February 20, 2003. Md. Code Ann., Cts. & Jud. Proc. § 5-

101 (2002). Thus, unless the amended complaint — filed after the statute of limitations ran — relates back to the date of the original filing, it will be barred by the statute of limitations and subject to dismissal. *See Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996) (noting that dismissal is the appropriate remedy when a claim is time-barred).

Locklear raises two arguments in support of his assertion that his amended complaint relates back pursuant to Fed. R. Civ. P. 15(c)(3): (1) replacing Hassleholms with Luna and Bergman qualifies as a mistake pursuant to Fed. R. Civ. P. 15(c)(3)(B); and (2) Luna and Bergman received timely notice and service of process under a Fed. R. Civ. P. 6(b)(2) court-granted service of process extension.[1] We reject his first argument and do not reach the second.[2]

Fed. R. Civ. P. 15(c), which governs name-changing amendments, provides in relevant part:

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[1] While Locklear maintains that the district court acted pursuant to Fed. R. Civ. P. 6(b)(2) when it extended the time for service, the court stated that it acted under Rule 4(m). (J.A. at 114.) Ultimately, however, this distinction makes no difference to our resolution of this appeal.

[2] Although Locklear cites a Maryland case in support of his position that he misnamed the proper defendant here, (Appellant's Br. 33-34), it is unclear whether, in so doing, he is arguing that his complaint should relate back under *state law* pursuant to Fed. R. Civ. P. 15(c)(1). Because Locklear did not clearly raise, in his opening brief, the argument that Maryland law permits relation-back here, we deem it waived. *Carter v. Lee*, 283 F.3d 240, 252 n. 11 (4th Cir. 2002).

> An amendment of a pleading relates back to the date of the original pleading when
>
> . . .
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The amended complaint in this case indisputably satisfies the first requirement of Rule 15(c)(3) because it simply adds the names of the newly-discovered defendants without altering the underlying cause of action stated in the original compliant. We therefore focus our attention solely on the application of Rule 15(c)(3)'s remaining requirements to Locklear's amended complaint, beginning with the requirement that Luna and Bergman "knew or should have known that, but for a mistake concerning" their identity, the action would have been brought against them.

Although Rule 15(c)(3)(B) speaks broadly of a "mistake concerning the identity of the proper party," we have, in

analyzing the scope of this rule, distinguished between mistake due to a lack of knowledge and mistake due to a misnomer. In so doing, we have not viewed lack of knowledge of the proper party to be sued as a "mistake" as that term is used in Rule 15(c)(3)(B). In the principal case on point, *Western Contracting Corp. v. Bechtel Corp*, we adopted the Seventh Circuit's holding that

> Rule 15(c)(2)[3] permits an amendment to relate back where that party is chargeable with knowledge of the mistake, but it does not permit relation back where, as here, there is a lack of knowledge of the proper party.

885 F.2d 1196, 1201 (4th Cir. 1989) (quoting *Wood v. Worachek*, 618 F.2d 1225, 1230 (7th Cir. 1980)) (internal citations omitted). We have also noted that "Rule 15 has its limits, and courts properly exercise caution when reviewing an application of the rule which would increase a defendant's exposure to liability." *Intown Properties Management, Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 170 (4th Cir. 2001); *see also Rennie v. Omniflight Helicopters, Inc.*, 1998 U.S. App. LEXIS 27050, No. 97-1524, 1998 WL 743678 (4th Cir. Oct. 23, 1998). Rule 15, moreover, must be applied especially cautiously when an amendment that "drags a new defendant into a case" is proposed. *Intown Properties*, 271 F.3d at 170.

Our interpretation of Rule 15(c)(3)(B) finds support in the jurisprudence of other circuits. For example, in *Rendall-Speranza v. Nassim*, the D.C. Circuit held that "a potential defendant who has not been named in a lawsuit by the time

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[3] Rule 15(c)(3) was numbered 15(c)(2) when *Bechtel* was decided.

the statute of limitations has run is entitled to repose — unless it is or should be apparent to the person that he is the beneficiary of a mere slip of the pen[.]" 323 U.S. App. D.C. 280, 107 F.3d 913, 918 (D.C. Cir. 1997). Likewise, the First Circuit, in adopting the same rationale we relied upon in *Bechtel*, found that a mistake does not relate back "where, as here, there is a lack of knowledge of the proper party." *Wilson v. United States Gov't*, 23 F.3d 559, 563 (1st Cir. 1994) (quoting *Wood*, 618 F.2d at 1230). Similarly, the advisory committee's notes to the 1991 amendments to Rule 15(c) lend support to the conclusion that "mistake" under subsection (3)(B) is distinguishable from a lack of knowledge of the proper defendant to be sued. The committee noted, "If the notice requirement is met within the Rule 4(m) period, a complaint may be amended at any time *to correct a formal defect such as a misnomer or misidentification.*" Fed. R. Civ. P. 15 advisory committee's note (1991 amendment) (emphasis added).

Based on these interpretations of Rule 15(c)(3)(B) — including our decision in *Bechtel*, which controls here — Locklear's substitution of Luna and Bergman for Hassleholms does not, for several reasons, qualify as a mistake under Rule 15(c)(3)(B).

First, Locklear's attempt to replace Hassleholms with Luna and Bergman can hardly be counted as a "mere slip of the pen." Rather, Locklear, by his own admission, lacked the requisite knowledge of the machine's manufacturer until eight months after filing the original complaint and six months after the statute of limitations expired. (J.A. at 15) (" Undersigned counsel has recently (within the last two weeks)[of September 4, 2003] discovered the name and location of the manufacturer[.]"). This being the case, *Bechtel* clearly forecloses Locklear's contention that his substitution of Luna

and Bergman for Hassleholms constitutes a "mistake" under Rule 15(c)(3)(B).

Second, Locklear's argument, if accepted, would erode the distinction between misidentification and lack of knowledge which we have held to be inherent in the meaning of Rule 15(c)(3)(B). *Bechtel*, 885 F.2d at 1201. As a result, Locklear would expand Rule 15(c)(3) beyond its intended purpose, which is to prevent a defendant from defeating an action on the basis of a formality that is neither a surprise or prejudicial to the misnamed party. *Nassim*, 107 F.3d at 918.

Third, Locklear's position fails because it would produce a paradoxical result wherein a plaintiff with no knowledge of the proper defendant could file a timely complaint naming any entity as a defendant and then amend the complaint to add the proper defendant after the statute of limitations had run. In effect, this would circumvent the weight of federal case law holding that the substitution of named parties for "John Doe" defendants does not constitute a mistake pursuant to Rule 15(c)(3). *Wayne v. Jarvis*, 197 F.3d 1098, 1103-04 (11th Cir. 1999); *Jacobsen v. Osborne*, 133 F.3d 315, 321 (5th Cir. 1998); *Baskin v. City of Des Plaines*, 138 F.3d 701, 704 (7th Cir. 1998); *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir. 1996) (internal quotations and citations omitted); *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 470 (2d Cir. 1995), *modified* 74 F.3d 1366 (2d Cir. 1996); *Wilson*, 23 F.3d at 563.

To overcome these deficiencies in his position, Locklear relies primarily on *McGuire v. Turnbo*, 137 F.3d 321, 325 (5th Cir. 1998), for his assertion that adding a new party

during a court-granted extension satisfies Rule 15(c)(3)(B).[4] *McGuire*, however, is easily distinguished because it addresses the formal name-correcting amendments anticipated when suing a United States entity or official.

In *McGuire*, the plaintiff originally sued the warden and other federal prison personnel because of their status as agents of the United States. *Id.* at 321. After filing the original complaint, the plaintiff received a two-week extension to serve process on the named defendants and the United States Attorney and United States Attorney General. *Id.* at 322. McGuire subsequently amended her complaint to include the United States as a party. *Id.*

The 1991 Committee Notes address this type of name-changing situation by stating:

> Rule 15(c) in conjunction with the revision of Rule 4(I) with respect to the failure of a plaintiff in an action against the United States to effect timely service on all the appropriate officials is intended to produce results contrary to those reached in *Gardner v. Gartman*, 880 F.2d 797, 799 (4th Cir. 1989) (holding that the naming of one government party or the wrong government official does not place the proper government party or official on notice of the suit); *Rys v. U.S. Postal Service*, 886 F.2d 443, 446-47 (1st Cir.

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[4] Locklear also briefly relies on *DeRienzo v. Harvard Indus.*, 357 F.3d 348 (3d Cir. 2004). *DeRienzo*, however, is inapposite because it is based on a New Jersey statutory provision — not applicable here — permitting the naming of John Doe defendants. In contrast, Maryland law does not provide for the use of John Doe defendants. *Nam v. Montgomery County*, 127 Md. App. 172, 732 A.2d 356, 363 (Md. Ct. Spec. App. 1999).

> 1989) (finding that although a plaintiff had named the United States Postal Service and three local departments, he was barred from amending his complaint to name the Postmaster General of the United States); *Martin's Food & Liquor, Inc. v. United States Dep't of Agriculture*, 702 F. Supp. 215, 216 (N.D. Ill. 1989) (dismissing the plaintiff's case against the United States Department of Agriculture because he was required to name the United States).

Fed. R. Civ. P. 15 advisory committee's note (1991 Amendment). As the D.C. circuit noted, this commentary "clearly indicates the rule is intended to be a means for correcting the mistakes of plaintiffs suing official bodies in determining which party is the proper defendant." *Nassim*, 107 F.3d at 918 (quoting *Donald v. Cook County Sheriff's Dep't.*, 95 F.3d 548, 560 (7th Cir. 1996)). Thus, *McGuire* does not influence our view of mistake due to lack of knowledge because it addresses only the notification of the United States of a pending lawsuit by service of process on its agents.

We therefore reaffirm that Rule 15(c)(3)(B) is not satisfied when the claimed mistake consists of a lack of knowledge of the proper party to be sued. Because we find that replacing Hassleholms with Luna and Bergman does not qualify as a "mistake" as that term is used in this rule, we need not address Locklear's second argument that Luna and Bergman were properly noticed and effectuated with service under Rule 4(m) as extended by the district court. *See Leonard v. Parry*, 219 F.3d 25, 28 (1st Cir. 2000) (noting that each of the Rule 15(c)(3) must be satisfied before an amendment will relate back).

III.

Accordingly, we AFFIRM the district court's dismissal of Locklear's complaint.

AFFIRMED

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. JFM-02-4087

[Filed October 29, 2004]

AARON LOCKLEAR	)
	)
v.	)
	)
BERGMAN & BEVING AB, ET AL.	)
	)

Frederick Motz, United States District Judge

OPINION

On December 20, 1999, Aaron Locklear was seriously injured in an industrial accident. His right hand was "degloved" when it became caught in a metal fabrication machine he was operating during the course of his employment at Maryland Plastics, Inc. in Aberdeen, Maryland. He has brought this action against Luna AB ("Luna"), a Swedish corporation that he alleges manufactured the machine, and Bergman & Beving AB ("Bergman"), another Swedish corporation that he alleges is the parent of Luna.

Defendants have filed motions to dismiss on the grounds that the action is time barred and that they are not subject to personal jurisdiction in Maryland. Finding that the action is time barred, I do not reach the jurisdictional question.

I.

Plaintiff filed his original complaint in this court on December 17, 2002. Based on a label found stamped on the metal fabrication machine, Plaintiff named as defendants (a) Hassleholms Mekanisk AB ("Hassleholms"), (b) a Hassleholms Wire Roller Machine identified by serial number, and (c) as "John Doe" defendants, the unknown seller, distributor, and importer of the machine.

Plaintiff did not serve the originally named defendants within the 120-day period required by Fed. R. Civ. P. 4(m). On April 30, 2003, I entered an order pursuant to Rule 4(m) directing Plaintiff to effect service on or before September 17, 2003. On September 4, 2003, Plaintiff filed a motion requesting a further nine months in which to effect service. In the motion Plaintiff indicated he had discovered that the actual manufacturer of the machine in question was not Hassleholms but another Swedish company. I granted the motion on September 8, 2003, giving Plaintiff nine months in which to effect service and requesting that an amended complaint be filed on or before October 10, 2003.

On October 9, 2003, Plaintiff filed his amended complaint, naming Luna and Bergman as defendants for the first time. He also altered the "John Doe" Defendants to encompass the unknown seller, distributor, and importer of a Luna Wire Roller Machine identified by the same serial

number used in the original complaint[1] Plaintiff's first contact with Defendants came via email messages sent to corporate officers for Luna and Bergman on or about February 20, 2004. According to affidavits submitted by Defendants, which are undisputed by Plaintiff, these emails were the first time that Defendants heard about the case.

On March 26, 2004, summonses were issued for Luna and Bergman. Process was effected on them on April 28, 2004.

II.

Maryland's three-year statute of limitations applies to this case. Md. Code Ann., Cts. & Jud. Proc. § 5-101.[2] Because

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[1] The records available to Defendants indicate that a now-defunct entity called MekanLuna AB manufactured machines of the type and serial number mentioned in the complaint Three machines of this type apparently were sold to Hassleholms in 1982. This may explain why the name Hassleholms appeared on the machine in question.

[2] Although it does not affect my analysis or the conclusions I reach, it is perhaps worthy of note that the limitations period apparently expired not on December 20, 2002 (three years after the accident) but on or about February 20, 2003. Under § 9-902 of the Maryland Labor and Employment Code, "[t]he period of limitations for the right of action of a covered employee . . . against the third party does not begin to run until two months after the first award of compensation made to the covered employee . . ." This section "does not postpone the accrual of an injured employee's cause of action against a third party until two months after his first award of compensation, but, rather, merely interrupts the running of limitations for a period of two months after his first award." *Turner v. Smalis, Inc.*, 622 F. Supp. 248, 251 (D. Md. 1985); *see also Hayes v. Wang*, 107 Md. App. 598, 601, 669 A.2d 771, 772

the amended complaint was filed more than three years after the incident in question, it must "relate back" to the original complaint in order to be considered timely. Relation back is governed by Fed. R. Civ. P 15(c), which provides:

> An amendment of a pleading relates back to the date of the original pleading when
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(1996). Plaintiff received his first award of compensation either on December 23, 1999, when a check for temporary total compensation was mailed to him, or on February 23, 2000, when the Workers' Compensation Commission entered an order directing that weekly payments be made to Plaintiff retroactive to December 24, 1999. In either event, the limitations period expired before I entered orders extending the time for service, before the amended complaint was filed, and before Defendants received notice of the suit.

As this case deals with new defendants, three elements of Rule 15(c)(3) apply. First, the claim must involve the same transaction or occurrence. Second, Luna and Bergman must have received notice of the action within the period provided by Rule 4(m) for service of the summons and complaint such that they will not be prejudiced in maintaining a defense on the merits. Third, Luna and Bergman must have known or should have known within the same notice period that the action would have been brought against them but for a mistake concerning identity. Defendants do not contest that Locklear's amended complaint arises out of the same transaction or occurrence as the original complaint. Thus, resolution of this question requires an inquiry into the remaining two requirements of Rule 15(c)(3).

A.

Rule 15(c)(3) requires a new defendant to receive notice of the institution of an action "within the period provided by Rule 4(m) for service of the summons and complaint" Rule 4(m) generally provides that a summons and complaint be filed within 120 days. In the present case, the 120-day period expired long before Defendants received their first notice of the suit The original complaint was filed on or about December 17, 2002, and Defendants first received notice of the suit on February 20, 2004, more than fourteen months later.[3]

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[3] Plaintiff argues that because he identified the metal fabrication machine involved in this case by a serial number in the original complaint, Defendants were placed on notice of the suit at the time of the first filing. It cannot be said that this argument falls from its own weight, but only for the reason that the argument has no weight whatsoever. Obviously, the mere inclusion of a serial number in a complaint filed in Baltimore, Maryland is not sufficient

Rule 4(m), however, permits the granting of extensions to effect service. At Plaintiff's request, I granted two such extensions, and Defendants did receive email notification of the suit before the second extension expired. Plaintiff, relying upon the advisory committee notes to Rule 15(c)(3), contends that Defendants therefore received timely notice. The committee notes provide in relevant part:

> In allowing a name-correcting amendment within the time allowed by Rule 4(m), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

Fed. R. Civ. P. 15(c), advisory committee's notes (1991 amendment).

This committee note refers to "a name-correcting amendment." Thus, the question arises whether the naming of entirely new defendants in an amended complaint (as was done here) fails within the purview of the rule. The context of the committee note suggests the answer is no. The note begins by stating that paragraph (c)(3) "has been revised to change the result in *Schiavone v. Fortune* [477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986)] with respect to the problem of a misnamed defendant." *Schiavone* was a case in which the defendant truly was "misnamed." There, the plaintiff named "Fortune" as the defendant in a claim for libel based on an article that appeared in *Fortune* magazine. "Fortune" was the

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to place Swedish corporations on notice that they are parties to a suit here.

name of an internal division of Time, Incorporated (Time). 477 U.S. at 23. Because of this misnomer, the Court held that under the prior version of Rule 15(c), the attempted service upon "Fortune" was insufficient to cause a subsequent amendment naming Time as the defendant to relate back, even though the plaintiff had attempted to serve process on Time's resident agent *Id.* at 27-32.

In the present case, Plaintiff did not "misname" the Defendants in his initial complaint. Rather, in the amended complaint, Plaintiff named entirely different companies than those he originally sued. In light of this fact, I find that the committee note does not apply and that the orders I entered on April 30, 2003, and September 8, 2003, cannot properly be deemed to have extended the period for service against Defendants. A contrary ruling would be fundamentally unfair, particularly because the limitations period had already expired when I entered my orders and when Plaintiff amended his complaint to add Luna and Bergman. Moreover, such a ruling would raise serious separation of powers concerns because it would enable a court to subvert the legislatively declared policies of finality and repose underlying statutes of limitations solely on the basis of a plaintiff's ex parte submission.

B.

Even if my interpretation of the committee note is incorrect, the amended complaint still cannot properly relate back. Rule 15(c)(3) also requires that in order for the relation back doctrine to apply, "within the period provided by Rule 4(m) . . ., the party to be brought in by amendment . . . knew or should have known that, *but for a mistake concerning the identity of the proper party*, the action would have been brought against the party." (emphasis added). Did Defendants

know (or should they have known) on February 20, 2004, when they first received notice of this suit, that they would have been named as defendants "but for a mistake concerning the identity of the proper party?"

Again, I find the answer is no. In construing the term "mistake," courts distinguish situations where the plaintiff merely erred in naming or formally identifying a party (e.g., *Schiavone*) from situations where the plaintiff did not know the identity of the party to be sued when he instituted the action. In the latter situation, courts have found that plaintiffs have not made a "mistake" within the meaning of Rule 15(c)(3) when failing to identify proper defendants in their original complaint *See, e.g., Barnes v. Prince George's County*, 214 F.R.D. 379, 381 (D. Md. 2003) ("a lack of knowledge of the true identity of a party does not qualify as a mistake' as that term is interpreted by a majority of circuits, including the Fourth."). The majority rule where a plaintiff has filed her original complaint naming John Doe defendants is "that Rule 15(c) does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities." *Barnes* at 381 (quoting *Barrow* v. *Wethersfield Police Dep't*, 66 F.3d 466, 470 (2d Cir. 1995)); *see also Wayne v. Jarvis*, 197 F.3d 1098 (11th Cir. 1999); *Baskin v. City of Des Plaines*, 138 F.3d 701 (7th Cir. 1998); *Jacobsen v. Osborne*, 133 F.3d 315 (5th Cir. 1998); *Cox v. Treadway*, 75 F.3d 230 (6th Cir. 1996); *Wilson v. United States Gov't*, 23 F.3d 559 (1st Cir. 1994).

In the present case Plaintiff has not sought to add Luna and Bergman to replace John Doe defendants but to replace Hassleholms, whom Plaintiff initially believed to be the manufacturer of the metal fabrication machine. This is an immaterial distinction. Even in cases not involving John Doe

defendants, the Fourth Circuit has held that relation back is not permitted "where there is a lack of knowledge of the proper party." *Western Contracting Corp. v. Bechtel Corp.*, 885 F.2d 1196, 1201 (4th Cir. 1989)(quoting *Wood v. Worachek*, 618 F.2d 1225, 1230 (7th Cir.1980)).[4] Moreover, as a matter of policy, there is no reason that a newly-added defendant should be subjected to relation back solely because the plaintiff originally named a defendant entirely unrelated to him, rather than a John Doe defendant. The purpose of Rule 15(c)(3) is "to avoid the harsh consequences of a mistake that is neither prejudicial nor a surprise to the misnamed party. A potential defendant who has not been named in a lawsuit by the time the statute of limitations has run is entitled to repose — unless it is or should be apparent to that person that he is the beneficiary of a mere slip of the pen. . . ." *Rendall-Speranza v. Nassim*, 323 U.S. App. D.C. 280, 107 F.3d 913, 918 (D.C. Cir. 1997). Neither Bergman nor Luna could have anticipated this suit prior to the emails received in February 2004, more than four years after Plaintiff's injury. Absent any notification of suit, constructive or otherwise, the Defendants are entitled to the repose and finality that underlies the decision to adopt a statute of limitations.

A separate order granting Defendants' motion to dismiss is being entered herewith.

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[4] *Western Contracting* was decided before Rule 15(c) was amended to overturn the Supreme Court's decision in *Schiavone*. However, while the Fourth Circuit cited *Schiavone* in its opinion for the general proposition that "notice must be received [by a new party] within the limitations period," the court held the plaintiff would be denied the benefit of the relation back doctrine even assuming that the newly-added parties had received sufficient notice precisely because relation back is not permitted "where, as here, there is a lack of knowledge of the proper party." *Id.* at 1201.

October 29, 2004
Date

/s/
J. Frederick Motz
United States District Judge

ORDER

For the reasons stated in the accompany memorandum, it is, this 29th day of October 2004

Ordered

1. Defendants' motion to dismiss (no. 18) is granted; and

2. This action is dismissed.

/s/ _____
J. Frederick Motz
United States District Judge

APPENDIX D

CIVIL RULES ADVISORY COMMITTEE MINUTES EXCERPTS

CIVIL RULES SUGGESTIONS DOCKET (Historical)

ADVISORY COMMITTEE ON CIVIL RULES

The docket sets forth suggested changes to the Federal Rules of Civil Procedure considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) civil rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

Suggestion

Rule 15(a)
Amendment may not add new parties or raise events occurring after responsive pleading

Docket Number, Source, and Date
Judge John Martin 10/20/94 &
Judge Judith Guthrie 10/27/94

Status
4/95 - Committee considered
11/95 - Committee considered and deferred
DEFERRED INDEFINITELY

Suggestion
Rule 15(c)(3)(B)
Clarifying extent of knowledge
required in identifying a party

Docket Number, Source, and Date
98-CV-E 9/98
Charles E. Frayer, Law student
9/27/98

Status

9/98 - Referred to chair, reporter, and Agenda Subcommittee

3/99 - Agenda Subcommittee rec. accumulate for periodic revision (1)

4/99 - Committee considered and retained for future study

5/02 - Committee considered along with J. Becker suggestion in 266 F.3d 186 (3rd Cir. 2001).

10/02 - Committee referred to subcommittee for further consideration

10/03- Committee considered

10/05 - Committee considered; subcommittee to be appointed

5/06 - Committee considered and removed from agenda

COMPLETED

Suggestion
Rule 15(c)(3)(B)
Amendment to allow relation back

Docket Number, Source, and Date
Judge Edward Becket, 266 F.3d 186 (3rd Cir. 2001)

Status
10/01 -Referred to chair and reporter
1/02 - Committee considered
5/02 - Committee considered
10/02 -Committee referred to subcommittee for further consideration
10/03- Committee considered
4/05 - Committee reviewed
10/05 -Committee considered; subcommittee to be appointed
5/06 - Committee considered and removed from agenda
COMPLETED

Minutes
Civil Rules Advisory Committee
May 6-7, 2002

* * *

Other Items

The relation-back provisions of Rule 15(c)(3) will be on the October agenda for discussion. A simple revision has been suggested by the opinion in *Singletary v. Pennsylvania Department of Corrections,* 3d Cir.2001, 266 F.3d 186. The suggestion is attractive. The specific problem is that a plaintiff who knows that it is impossible to identify an intended defendant is given less effective relief than a plaintiff who mistakenly believes that the proper defendant has been properly named. But in approaching it the committee must consider a series of questions. Perhaps the first question is how frequently the committee should act to correct interpretations of the rules that seem wrong. It is not wise, and perhaps would not be possible, to react whenever a court seems to give a wrong answer. Even when a number of courts have concurred in a seemingly wrong answer, the question may not be so important as to deserve a rule amendment. Continual amendment to provide specific answers to ever more specific questions could produce rules that are too complex and too rigid to survive. A second question is whether this specific question should be addressed without also reviewing other aspects of Rule 15(c)(3) that seem unsatisfactory. There are good reasons to question the way the rule is presently drafted. A third question, specific to Rule 15(c), is whether it is wise to continually revisit a rule that presents significant Enabling Act questions. One main function of Rule 15(c)(2) and (3) is to allow claims that would be barred by limitations in the state courts that provide the

law governing the claim. Acting to expand this incursion into the realms of state law may be inappropriate.

* * *

MINUTES
CIVIL RULES ADVISORY COMMITTEE OCTOBER
OCTOBER 3- 4, 2002

* * *

Rule 15(c)(3)

In *Singletary v. Pennsylvania Department of Corrections,* 3d Cir.2001, 266 F.3d 186, the court invited this Committee to consider an amendment of Rule 15(c) (3) identified in an earlier Committee agenda item. The problem arises from the provision that allows relation back of an amendment changing the party or the naming of a party against whom a claim is asserted when, among other things, the new party had notice that but for some "mistake" concerning the identity of the proper party, the action would have been brought against the new party. Several courts of appeals have agreed that when a plaintiff is aware that the plaintiff cannot identify an intended defendant, there is no "mistake." The problem has arisen in a variety of settings. A common illustration is provided by a plaintiff who believes that police officers have used excessive force against the plaintiff but who cannot identify the police officers to sue. A direct approach to this problem would be to add a few words to Rule 15(c) (3) : "but for some mistake or lack of information concerning the identity of the proper party * * * ."

The apparently easy amendment may not be so easy. The cases that evoke sympathy are those in which a plaintiff has made diligent efforts to identify the proper defendant within the limitations period, but has failed. There is less reason for concern when a plaintiff simply waits to file on the last day of the limitations period and then sets about identifying a proper

defendant. If this omission is to be addressed, the amendment is not quite so simple.

If Rule 15(c) (3) is to be amended, it also must be asked whether some of its other apparent problems should be addressed. Truly perplexing puzzles are posed by the 1991 amendment that set the time for getting notice to the new defendant as "the period provided by Rule 4(m) for service of the summons and complaint." Unraveling these puzzles will be difficult, in part perhaps because they do not appear to have caused any general problems in actual practice.

Yet other questions might be addressed. Rule 15(c) (3) has never been used to address the problems that arise from changing plaintiffs after a limitations period has expired; these problems are not much less difficult than the problems that attend changing defendants. Counterclaims might be addressed. Still other clarifications seem desirable.

A more fundamental set of questions also besets Rule 15(c) (3). Rule 15(c) (1) allows relation back of an amendment whenever relation back is permitted by the law that provides the statute of limitations applicable to the action. The sole purpose of Rule 15(c) (3) is to permit relation back when the statute cannot be interpreted to permit it. This result may seem at odds with the Enabling Act provision that a rule must not abridge, enlarge, or modify any substantive right.

Brief discussion noted that "Doe" pleading in California is disruptive, posing real problems for the courts. It may be used for cases in which the plaintiff knows the identity of an intended defendant but does not know whether there is a cause of action.

But it also was noted that the "lack of information" provision would address a real problem. There are many cases
in which a diligent plaintiff is not able, without the help of discovery, to identify a proper defendant. These questions are of interest not only to plaintiffs but also to judges, municipal entities, and many others.

These problems are difficult. It may prove desirable to appoint a subcommittee to consider them in greater depth before the Committee considers them further.

* * *

Minutes
Civil Rules Advisory Committee
October 2-3, 2003

* * *

Rules 15, 50(b)

The Committee has carried forward for some time the inquiry whether Rule 15 should be amended. One particular proposal has been to adjust the relation-back provisions of Rule 15(c)(3). Other questions address the right to amend once as a matter of course and the best means of expressing and perhaps distinguishing the tests for amendment before trial and at trial. The issues are conceptually difficult. The real-world importance of the issues has not yet been examined; if they are primarily theoretical, there may be little reason to wrestle with the conceptual questions. In order to help frame the questions for action, a Subcommittee chaired by Judge Kyle will study the proposals and report to the Committee. It may be that proposals can be pursued in tandem with the Style Project.

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MINUTES
CIVIL RULES ADVISORY COMMITTEE
OCTOBER 27-28, 2005

* * *

Rule 15

The agenda book presents two pleading topics. One is the question whether the broad general approach of "notice" pleading should be reconsidered. The other is a narrower set of questions addressed to the amendment practice established by Rule 15. Movement away from notice pleading might have a profound impact on amendment practice, but it remains useful to consider possible revisions of Rule 15 within the present notice pleading system. A subcommittee considered Rule 15 questions not long ago, and recommended that any study be deferred pending completion of other large projects. Those projects have been completed, and the time is ripe to begin defining the next set of projects. For that matter, one special aspect of Rule 15(c) has come on for substantial attention this year as courts struggle with the need to apply the February 18, 2005 effective date of the Class Action Fairness Act jurisdiction and removal provisions to litigation commenced earlier but subject to later amendments.

Four options are suggested for dealing with these issues: a thorough revision of Rule 15; a very narrow revision of Rule 15(c)(3) to allow relation back not only when there is a mistake but also when there is a lack of information as to the identity of a new defendant; do nothing now, but keep these questions on the docket for future consideration; and purge Rule 15 from the docket.

A somewhat more detailed summary of the Rule 15 materials was provided.

One discrete set of questions arises from the seemingly odd provision in Rule 15(a) that cuts off the right to amend once as a matter of course on the filing of a responsive pleading but not on the filing of a responsive motion. Judges have suggested that this should be changed — among the suggestions submitted to the Committee are that the fight to amend as a matter of course should be eliminated, or that it should terminate when a motion to dismiss is filed. Particular irritation is expressed over the experience of encountering an amended complaint filed after submission of a motion to dismiss. Many other revisions are possible, including a revision that would allow amendment as a matter of right within a defined period after a responsive pleading or motion is filed. This generous approach might be defended on the grounds that it remains possible to misplead a valid claim and that leave to amend would almost certainly be granted to any plaintiff who wishes to persist in face of the initial objections.

Other general Rule 15 suggestions have been that Rule 15(b) may be too generous in its approach to amendment at trial; that amendment should be accomplished by filing a complete amended pleading rather than a separate document that must be considered together with earlier pleadings; and that Rule 13(0 might be better integrated with Rule 15.

A different Rule 15 issue has held a place of honor on the agenda for several years. It began with a simple suggestion to amend Rule 15(c)(3). One of the tests for permitting relation back of an amendment changing the party against whom a claim is asserted is that within an appropriate time the new party must have notice so that it knew or should have known that it would have been sued "but for a mistake concerning

the identity of the proper party." This language has been tested in many cases in which the plaintiff knew that it could not identify a party that it would make a defendant if identification were possible. Recurring illustrations are provided by actions claiming unlawful police behavior in which the plaintiff cannot name the police officers involved. Several circuits have ruled that in such cases there is no "mistake" and that an amendment naming the proper police officer defendant cannot relate back even though all other (c)(3) requirements are satisfied. It is possible to conjure up reasons to explain this result — the plaintiff who knows of the identity problem should work harder, or file earlier in the limitations period. But these reasons are not compelling. The Third Circuit has rejected them in forceful dictum, and has suggested that the rule should be amended to allow relation back when the new defendant knows it would have been named but for a "mistake or lack of information concerning the identity of the proper party."

Consideration of this seemingly simple proposal initially leads to the question whether other aspects of Rule 15(c) might usefully be considered at the same time. As a matter of abstract theory, it is possible to imagine many untoward results arising from the invocation of Rule 4(m) in (c)(3). There is no indication that these possibilities in fact have emerged in practice, but it is fair to wonder whether it is proper to amend the rule even in a small way when it presents manifest opportunities for mischief.

Beyond the drafting problems with present Rule 15(c)(3) lies the central question whether (c)(2) and (c)(3) present genuine Enabling Act questions. (c)(1) provides for relation back when "permitted by the law that provides the statute of limitations applicable to the action." That means that the only occasion for invoking (2) or (3) arises then the applicable

limitations law does not permit relation back. These paragraphs operate to defeat a defense established by controlling limitations law. How is this a matter of practice or procedure that does not abridge or modify the defendant's substantive rights and enlarge the plaintiff's substantive rights? There may indeed be cases in which the problem really is one of pleading misadventure, and in which all reasonable limitations policies have been satisfied. The case that prompted the adoption of Rule 15(c)(3), Schiavone v. Fortune, 1986, 477 U.S. 21, may well be such a case. It involved the mistaken designation of the defendant under the name of the division that committed the allegedly wrongful acts rather than under the proper corporate name. The 1991 Committee Note begins by stating that Rule 15 is "revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." But in many cases — and particularly in cases where the plaintiff knows that it cannot identify an intended defendant — the problem is not really a problem of pleading procedure. It is one of limitations policy. Rule 15(c) can be defended as good limitations policy, but is that enough? Is it enough because Courts have accepted relation back under Rule 15(c) since 1966 without hesitating over Enabling Act abstractions?

Discussion began by asking whether law professors tend to think there are serious Enabling Act problems with Rule 15(c). One answer was that "it is problematic." Another answer began with the observation that before 1991 it was possible to argue that then-Rule 15(c) governed relation back exclusively, prohibiting relation back outside its terms even if state law would permit it. The First Circuit rejected this argument, and properly so. Present (c)(1) is a desirable recognition that federal courts should honor state law that permits relation back. But what of the situation where state

law prohibits relation back? It has been accepted for a long time that 15(c) properly permits what state law does not permit. If it is not currently invalid, a small change might not make any difference. At the same time, it can be predicted that any change will encourage some academic doubters to renew the general question of validity. And it is possible that state attorneys general also will challenge it — they have a strong interest in the many civil rights actions challenging acts by state officials.

It was suggested that it would be possible to address the 15(a) questions and then perhaps think about subdivision (c) as a matter of "fairness."

The discussion concluded at this point to defer to the last remaining agenda item, Rule 30(b)(6). It was agreed that Rule 15 would be carried forward for future discussion. It may prove useful to again seek work in a subcommittee before bringing these questions back to the full committee.

* * *

MINUTES
CIVIL RULES ADVISORY COMMITTEE
MAY 22-23, 2006

* * *

Judge Baylson then turned to Rule 15(c), a topic that divided the Subcommittee. The Committee first put Rule 15(c) on the agenda in response to the suggestion of a first-year law student. The suggestion addressed a very specific point. A few courts had then taken a view of Rule 15(c)(3) that now has been adopted by several circuits. Relation back of an amendment changing the party against whom a claim is asserted requires that the new party have received notice that but for some "mistake" concerning the identity of the proper party, the new party would have been sued. "[M]istake" is read to cover only a claimant who erroneously believes that the right defendant has been identified. If the claimant knows that it cannot identify the proper defendant, there is no "mistake," but only ignorance. This interpretation could easily be changed by adding four words: "mistake or lack of information." Consideration of this simple change, later strongly urged by Judge Becker in *Singletary v. Pennsylvania Department of Corrections,* 3d Cir. 2001, 266 F.3d 186, gradually grew into an elaborate study of Rule 15(c). The study found many conceptual shortcomings in the rule, but at the same time found little indication that the shortcomings have any significant effect on practice.

* * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-02-4087

[Filed April 30, 2003]

AARON LOCKLEAR	)
	)
v.	)
	)
HASSLEHOLMS MEKANISK, AB, ET AL	)
	)

ORDER

On December 16, 2002, plaintiff's counsel submitted a letter to this court in which he requested that the complaint be filed and that service of the summons be held "at a later date."

Plaintiff's counsel has had no further communication with the court. Accordingly, it is, this 30th day of April 2003.

ORDERED that plaintiff effect service upon defendant Hassleholms Mekanisk, AB on or before September 17, 2003.

/s/
J. Frederick Motz
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM-02-4087

[Filed September 4, 2003]

AARON LOCKLEAR	)
PLAINTIFF	)
	)
v.	)
	)
HASSLEHOLMS MEKANISK, AB, ET. AL.	)
DEFENDANTS	)
	)

MOTION TO EXTEND THE DEADLINE FOR SERVICE OF PROCESS

AARON LOCKLEAR ("LOCKLEAR"), by and through his undersigned counsel, John M. Kotzker, hereby respectfully submits to this Honorable Court this "Motion to Extend the Deadline for Service of Process" on the Defendants in this case; the Plaintiff hereby provides the following as basis for such request for extension:

1. This Court has set a deadline for the Plaintiff to effectuate service of process by September 17, 2003.

2. Plaintiff has made a good faith attempt to discover the unknown entities, including but not limited to those individuals and entities privy to the chain of commerce who are responsible for the manufacturing, sale and use of the allegedly defected equipment causing severe injury to the Plaintiff.

3. To date, Plaintiff has expended considerable expense in locating the foreign manufacturer that built the machine which malfunctioned and amputated his hand because the name on the machine is not the name of the manufacturer but rather the name of the industrial city in Sweden where it was built. Undersigned counsel has recently (within the last two weeks) discovered the name and location of the manufacturer of the defective equipment, and has further discovered that the manufacturer is a Swedish company, doing business in the United States of America, including but not limited to Maryland.

4. Plaintiff is making good faith attempts to discover the existence and location of any American subsidiary and or registered agent, principals, affiliates, executives, distributors, salesperson(s), and or other individuals involved in the Swedish company and located in the United States.

5. Plaintiff acknowledges and represents to this Court that the purpose of discovering any affiliate and or subsidiary, as described above, is to circumvent the undue burden and indefinite delay that may be involved in serving a foreign corporation, which may require the compliance with numerous international conventions, treaties and resolutions.

6. Plaintiff further states to this Honorable Court that the injuries sustained as a result of the alleged defective equipment have resulted in the loss of Plaintiff's hand causing

continual, substantial mental and physical pain, suffering and irreparable damage and harm; and, it would be in the interest of justice that the Plaintiff's case be heard and tried in this Honorable Court.

7. Plaintiff has no other adequate remedy at law.

8. Plaintiff will be filing an Amended Complaint that contains the name of the recently discovered manufacturer.

9. Plaintiff's counsel represents to this Court that this matter is not dilatory but rather that it is the Plaintiff's desire to get this matter to trial as soon as possible and that finding and serving the correct parties has taken substantial time and resources.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court extend the deadline for Service of Process for his case for a period of nine (9) months from the original deadline, currently scheduled for September 17, 2003.

Respectfully submitted,

Kotzker/Shamy, P.L.

John M. Kotzker
electronically signed

John M. Kotzker, Esq.
Federal Bar # 10725
Attorney for Plaintiff/Trial Counsel
2724 West Atlantic Boulevard
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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM-02-4087

[Filed September 8, 2003]

AARON LOCKLEAR PLAINTIFF	)
v.	)
HASSLEHOLMS MEKANISK, AB, ET. AL. DEFENDANTS	)

MARGINAL ORDER

MOTION TO EXTEND THE DEADLINE FOR SERVICE OF PROCESS

Granted

/s/
9/8/03

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Chambers of
J. Frederick Motz
United States District Judge
101 West Lombard Street
Baltimore, Maryland 21201
(410) 962-0782
(410) 962-2698 FAX

September 8, 2003

Memo Re: Locklear v. Hasselholmes, et al.
Civil No. JFM-02-4087

Dear Mr. Kotzker:

I am in receipt of your letter dated September 4, 2003.

Please file an amended complaint on or before October 10, 2003.

Very truly yours,

/s/

J. Frederick Motz
United States District Judge

No. 06-786

In The
Supreme Court of the United States

AARON LOCKLEAR,

Petitioner,

v.

BERGMAN & BEVING AB; LUNA AB,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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January 2, 2007

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the Fourth Circuit correctly determine that the amended complaint, filed after limitations had run, did not relate back under Federal Rule of Civil Procedure 15(c)(3) to the original complaint where: the plaintiff, lacking knowledge of Bergman & Luna, sued another, unrelated defendant in the original complaint shortly before limitations were to expire; the plaintiff first discovered Bergman & Luna only after the limitations period had run; the amended complaint substituted Bergman and Luna as entirely new parties to replace the original defendant; and Bergman and Luna had no prior notice whatever of the claim?

CORPORATE DISCLOSURE STATEMENT

Respondent Bergman & Beving AB is a publicly held corporation of which there is no parent corporation and of which no other publicly held corporation holds ten percent or more of the stock. Respondent Luna AB is the subsidiary company of its parent, Bergman & Beving AB.

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STATUTE

Md. Lab. & Empl. Code Ann. § 9-902(c)-(d) (1991, 1999 Repl. Vol.) 2, 3, 4, 5

RULES AND STATUTORY PROVISIONS

Fed. R. Civ. P. 4(m)

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

Fed. R. Civ. P. 15(c)

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a

defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against that party.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirements of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Md. Lab. & Empl. Code Ann. § 9-902(a)(c)-(d) (1991, 1999 Repl. Vol.)

§ 9-902. Action against third party after award or payment of compensation.

(a) *Action by self-insured employer, insurer, or fund.* – If a claim is filed and compensation is awarded or paid under this title, a self-insured employer, an insurer, the Subsequent Injury Fund, or the Uninsured Employers' Fund may bring an action for damages against the third party who is liable for the injury or death of the covered employee.

. . .

(c) *Action by covered employee or dependents.* – If the self-insured employer, insurer, Subsequent Injury Fund, or Uninsured Employers' Fund does not bring an action against the third party within 2 months after the Commission makes an award, the covered employee or, in case of death, the dependents of the covered employee may bring an action for damages against the third party.

(d) *Limitations period.* – The period of limitations for the right of action of a covered employee or the dependents of the covered employee against the third party does not begin to run until 2 months after the first award of compensation made to the covered employee or the dependents under this title.

INTRODUCTION

Petitioner Aaron Locklear ("Locklear") was injured on the job in a factory machine accident in December 1999. He contemplated a product liability and negligence suit. By his own admission (*see* Petition at 4), it appears that he did not begin his inquiry to determine the manufacturer of the machine until three weeks before Maryland's general three-year statute of limitations was to expire. Locklear first filed a complaint suing another, unrelated Swedish company, Hassleholms Mekanisk AB, as the defendant in December 2002. Three years and nine months after the accident, in October 2003, he filed an amended complaint suing Respondents, Bergman & Beving AB and Luna AB ("Bergman and Luna") as the defendants. Bergman and Luna first learned about the accident and the lawsuit in February 2004, i.e., four years and two months after the cause of action accrued. Both the district court and the circuit court concluded that the amended complaint did not relate back under Federal Rule of Civil Procedure 15(c)(3) and was therefore time-barred by limitations. The lower courts held that Locklear's lack of knowledge of Bergman and Luna under these circumstances did not constitute a naming mistake that could be corrected by a

relating-back amendment. The decisions of the lower courts concurred with the great weight of authority on the working of Rule 15(c)(3).

STATEMENT OF THE CASE

Locklear alleged that on or about December 20, 1999, he was hurt while operating a metal rolling machine while at work within the Maryland Plastics, Inc., plant in Aberdeen, Maryland. The original complaint was not filed until December 17, 2002, a few days before Maryland's general three-year limitations period was to expire. The temporary tolling provision under Maryland's workers' compensation law extended the limitations period for Locklear's action against a third party, e.g., the machine's manufacturer, an additional two months until February 2003. Locklear thus enjoyed a full 38 months, from December 1999 to February 2003, to determine his proper defendant.

Locklear acknowledges the statute of limitations ran on or about February 20, 2003. Petition at 5. However, Locklear misstates the operation of the temporary tolling provision in the workers' compensation law by suggesting at page 4 of the Petition that he was obliged to wait for "authorization" from his employer or from the workers' compensation insurer before pursuing a claim against a third-party defendant. He further suggests that he was only "authorized" to pursue his claim three weeks prior to the expiration of limitations. Those assertions are incorrect. The statute requires only that an injured worker wait two months from his first award of compensation before

suing a third-party defendant. Md. Lab. & Empl. Code Ann. § 9-902(c)-(d) (1991, 1999 Repl. Vol.); *see also* the district court's analysis in Petition App. at 17a, n.2. If the employer or insurer has not brought an action against the third party by then, the injured worker is free to do so. *Id.* Locklear received his first compensation check December 23, 1999. Two months later, in February 2000, no action having been filed by the employer or insurer, he was permitted to file suit at any time thereafter until February 20, 2003.

The original complaint sued as the defendant Hassleholms Mekanisk AB, a registered corporation of Hassleholm, Sweden, or that corporation's successor, assign, purchaser, or surviving legal entity.[1] Locklear also sued a Hassleholms wire roller machine type 1P110/5, serial #: 954 (*sic*); an "Unknown Seller" of the same Hassleholms wire roller machine; an "Unknown Distributor" of the same Hassleholms wire roller machine; and an "Unknown Importer" of the same Hassleholms wire roller machine. Locklear failed to serve any of these original defendants within the general 120-day period contemplated by Rule 4(m), i.e. before April 16, 2003.

By order dated April 30, 2003, the district court directed Locklear to effect service upon defendant Hassleholms Mekanisk AB, on or before September 17, 2003. Petition App. at 41a. The order recounted, "On December 16, 2002, plaintiff's counsel submitted a letter to this court in which he requested that the complaint be filed

[1] The letters AB in the name stand for "Aktiebolag," literally translated from the Swedish as a "share company" or more accurately construed to mean a corporation. In the original complaint Locklear thus sued the Hasselholm Mechanical Corporation.

and that service of the summons be held 'at a later date.' Plaintiff's counsel has had no further communication with the court." Shortly before the new deadline, on September 4, 2003, Locklear by motion (Petition App. at 42a) requested a further extension of nine months to serve the defendants, which request was granted by marginal notation on September 8, 2003. Locklear's motion to extend the deadline for service informed the court in paragraph 3 that, within the last two weeks, he had discovered the name and location of the manufacturer of the allegedly defective equipment.[2] By letter dated September 8, 2003, the court directed Locklear to file an amended complaint by October 10, 2003. Petition App. at 46a.

Locklear filed his amended complaint on October 9, 2003. The amended complaint deleted Hassleholms Mekanisk AB as the defendant and substituted instead Bergman & Beving AB, of Stockholm, Sweden, and Luna AB of Alingsås, Sweden. The amended complaint further named as defendants an unknown seller, an unknown distributor, and an unknown importer of a Luna machine type IP110/5. The amended complaint alleged that the factory machine was designed and built by Luna AB and Bergman & Beving AB. The amended complaint sounded in negligence, strict product liability, and breach of warranty.

On February 20, 2004, i.e., four years and two months after the accident, Locklear's counsel sent an e-mail message to both Luna and Bergman advising them of the

[2] Locklear did not disclose the names of the new defendants in these communications with the district court.

suit; a copy of the amended complaint was attached to that e-mail message. The February 20, 2004, e-mail message was the first notice to Bergman and Luna of the accident or of the lawsuit. Summonses for Bergman and Luna issued March 26, 2004. Service of process was effected later in the spring of 2004.

Bergman and Luna moved preliminarily to dismiss on the grounds of lack of personal jurisdiction and the time bar of limitations. Not reaching the jurisdiction issue (*see infra* page 16), the U.S. District Court for Maryland granted the motion to dismiss by reason of limitations. *Locklear v. Bergman & Beving AB*, 224 F.R.D. 377 (D. Md. 2004); Petition App. at 15a.

The district court dismissed the action, rejecting in detail Locklear's view that the amended complaint related back. The district court first discarded Locklear's contention that by identifying the factory machine's serial number in the original complaint, he had placed Bergman and Luna on notice of the claim at the time of the first filing. Petition App. at 19a, n.3 ("It cannot be said that this argument falls from its own weight, but only for the reason that the argument has no weight whatsoever. Obviously, the mere inclusion of a serial number in a complaint filed in Baltimore, Maryland, is not sufficient to place Swedish corporations on notice that they are parties to a suit here.") The trial court next determined that service extensions granted under Rule 4(m) apply only to a name-correcting amendment, rather than the addition of entirely new defendants as here, for the purposes of Rule 15(c) analysis. *Id.* at 21a ("Plaintiff did not 'misname' the Defendants in his initial complaint. Rather, in the amended complaint, Plaintiff named entirely different companies than those he originally sued.") Finally, the

district court explained that Locklear's lack of knowledge of the identity of Bergman and Luna was not a "mistake" within the meaning of Rule 15(c)(3) when he failed to identify them at all as defendants in the original complaint, and the Swedish companies could not have anticipated the action prior to the e-mails received in February 2004, more than four years after the injury. *Id.* at 22a-23a. The district court concluded, "Neither Bergman nor Luna could have anticipated this suit prior to the emails received ... more than four years after Plaintiff's injury. Absent any notification of suit, constructive or otherwise, the Defendants are entitled to the repose and finality that underlies the decision to adopt a statute of limitations." *Id.* at 23a.

Not reaching a second question pertaining to Rule 4 (*see infra* page 15), the U.S. Court of Appeals for the Fourth Circuit affirmed. *Locklear v. Bergman & Beving AB*, 457 F.3d 363 (4th Cir. 2006); Petition App. at 3a. In affirming, the Fourth Circuit held that Rule 15(c)(3)(B) is not satisfied when the claimed mistake consists of a lack of knowledge of the proper party to be sued, and that Locklear's replacing Hasselsholms Mekanisk AB with Bergman and Luna did not qualify as a mistake for the purposes of the relation-back rule. Petition App. at 13a.

The Fourth Circuit panel denied without comment Locklear's petition for rehearing.

REASONS FOR DENYING THE PETITION

1. The Fourth Circuit's decision was correct.

This Court should deny the Petition because the Fourth Circuit correctly interpreted and applied Rule 15(c)(B)(3) to Locklear's untimely amended complaint. The unanimous panel of the appellate court first observed generally that "'Rule 15 has its limits, and courts properly exercise caution when reviewing an application of the rule that would increase a defendant's exposure to liability,'" *id.* at 9a (quoting *Intown Properties Management, Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 170 (4th Cir. 2001)); that Rule 15 "must be applied especially cautiously when an amendment that 'drags a new defendant into a case' is proposed," *id.* (quoting *Intown Properties* at 170); and that "'a potential defendant who has not been named in a lawsuit by the time the statute of limitations has run is entitled to repose – unless it is or should be apparent to a person that he is the beneficiary of a mere slip of the pen,'" *id.* at 9a-10a (quoting *Rendall-Speranza v. Nassim*, 107 F.3d 913, 918 (D.C. Cir. 1997)).

The Fourth Circuit underscored that Locklear's attempted replacement of Hasselholms with Bergman and Luna was much more than a "mere slip of the pen" in which he merely miscast one known entity for another known entity; Locklear conceded that he did not even learn of Bergman and Luna until six months after the statute of limitations expired. Petition App. at 10a. The Fourth Circuit explained that Locklear's view "would expand Rule 15(c)(3) beyond its intended purpose, which is to prevent a defendant from defeating an action on the basis of a formality that is neither a surprise or prejudicial to a misnamed party." *Id.* at 11a. The Fourth Circuit added that Locklear's position would produce an unacceptable

paradox: a plaintiff with no knowledge of the proper defendant could file a timely complaint naming any entity (effectively a John Doe defendant even where the use of John Doe parties is forbidden) and trump the statute of limitations by later amendment. *Id.*

2. The assertion of an irreconcilable conflict among the Circuit Courts fails.

The Fourth Circuit decided this case consistent with the overwhelming weight of authority pertaining to the limited scope of a "mistake" for relation back purposes within the operation of Rule 15(c)(3). *See, e.g.*, *Barrow v. Wethersfield Police Dept.*, 66 F.3d 466 (2d Cir. 1995); *Jacobsen v. Osborne*, 133 F.3d 315 (5th Cir. 1998); *Cox v. Treadway*, 75 F.3d 230 (6th Cir. 1996); *Delgado-Burnet v. Clark*, 93 F.3d 339 (7th Cir. 1996); *Garrett v. Fleming*, 362 F.3d 692 (10th Cir. 2004); *Wayne v. Jarvis*, 197 F.3d 1098 (11th Cir. 1999). Locklear struggles to create the illusion of an emphatic split among the circuits where it does not exist. Upon careful examination, the few cases he offers as evidence of a split can either be comfortably harmonized with the Fourth Circuit's view on the law or be readily distinguished on their facts from the facts presented to the Fourth Circuit by Locklear's action against Bergman and Luna.

In *Roberts v. Michaels*, 219 F.3d 775 (8th Cir. 2000), the Eighth Circuit explained and applied Rule 15(c)(3), exactly as intended, to permit a name-changing amendment in recognition of "the traditional misnomer principle." *Id.* at 778, 779. Having been misled by the defendant's testimony at a prior administrative hearing, the plaintiff sued "Ron Michaels d/b/a Mid-South Vending"; the appellate

court specifically noted that the defendants themselves had created the potential for confusion by doing business under a fictitious name, Midsouth Vending, and had compounded the confusion by using the wrong corporate name in the earlier administrative proceedings. *Id.* at 779. The plaintiff then amended to correct the misnomer and sue "Midsouth Food Vending Service, Inc." *Id.* at 777. The Eighth Circuit invoked "the well-recognized distinction between a complaint that sues the wrong party, and a complaint that sues the right party by the wrong name." *Id.* at 777-78. Ironically, in light of Locklear's Petition challenging a decision of the Fourth Circuit, the Eighth Circuit in *Roberts* relied on a Fourth Circuit case as authority in separating permissible amendments that relate back to correct a misnomer from impermissible amendments that do not relate back to correct a misjoinder: "What was involved was, at most, a mere misnomer that injured no one. . . . The case is not one . . . of an amendment which would bring the defendant into the case for the first time and might prejudice its right to rely on the statute of limitations." *Id.* at 778 (quoting *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873-74 (4th Cir. 1947)). Locklear's post-limitations amended complaint did not correct a misnomer pertaining to Bergman and Luna; by no stretch of the imagination was Hassleholms Mekanisk a mistaken name for Bergman & Beving or Luna. Instead, Locklear tried to bring in Bergman and Luna for the first time. The Eighth Circuit stands squarely with the Fourth Circuit in rejecting such an amendment under Rule 15(c)(3) after limitations have run.

The Second Circuit in *Soto v. Brooklyn Correctional Facility*, 80 F.3d 34 (2d Cir. 1996) addressed a case where

a pro se litigant filed a section 1983 civil rights action against an institutional defendant without naming individual defendants. The Second Circuit aptly observed this is the very type of case for which Rule 15(c) was created: where plaintiffs, unaware of the technical requirements of law, mistakenly named institutional instead of individual defendants; and Rule 15(c) was "expressly intended to preserve legitimate suits despite such mistakes *of law* at the pleading stage." *Id.* at 35-36 (emphasis added). The Second Circuit described pro se litigant Soto's failure to name individual defendants as a "mistake as to the technicalities of constitutional tort law." *Id.* at 37. The plaintiff in *Soto*, alleging that he had been attacked in the Brooklyn jail, failed to comply with the pleading requirement that he name individual wrongdoers. But for his mistake of law, he could have named the jail superintendent and the correctional officers in question. *See id.* The Second Circuit, mindful of the express intention of Rule 15(c) to preserve meritorious actions against government institutions and their personnel, gave Soto a second chance. *Soto* is inapposite to the present case where Locklear, represented by counsel in private litigation, did not timely locate the defendants he ultimately determined to sue (and where no constitutional claims were asserted).

The Third Circuit's case of *Singletary v. Pennsylvania Dept. of Corrections*, 266 F.3d 186 (3rd Cir. 2001), again involved a section 1983 civil rights action against a government facility and personnel. The plaintiff's son committed suicide in a Pennsylvania prison. *Id.* at 189. After limitations had run, the plaintiff moved to amend her complaint to substitute for "Unnamed Corrections Officers" a prison psychologist who had met with and evaluated the prisoner on a weekly basis. *Id.* at 191. The Third

Circuit, after long and careful analysis of the intricacies of constructive and shared notice, concluded that the psychologist did not receive notice of the claim until long after limitations had run. *Id.* at 200. The Third Circuit decided *Singletary* on the notice question. It did not decide any question pertaining to whether the plaintiff's lack of knowledge of the psychologist's identity constituted a mistake for Rule 15(c)(3) purposes. In dicta, the Third Circuit acknowledged that all of the other Courts of Appeal had concluded that a lack of knowledge of a defendant's identity is not a "mistake" concerning that identity. *Id.* at 201. In dicta, the Third Circuit requested that the Advisory Rules Committee consider the question further. *Id.* at 203.[3] The Advisory Rules Committee has done so. The Rules Committee docket (*see* Petition App. at 27a-28a) indicates that the Committee, and a specially-tasked subcommittee, devoted approximately six years of thought to analyze the extent of knowledge required in identifying a party under Rule 15(c)(3)(B) in the context of relation-back law. The Committee declined (Petition App. at 40a) to recommend expanding Rule 15(c)(3)(B) to embrace relating-back amendments due to "mistake or lack of information," the position advanced by Locklear. It completed its consideration without recommending any change, and the topic has been removed from the Rules Committee's agenda. *See* Petition App. at 27a, 28a.

Finally, the First Circuit case of *Leonard v. Parry*, 219 F.3d 25 (1st Cir. 2000), arose from a comedy of drafting

[3] In any event, the Third Circuit's dicta on this nuance of Rule 15(c)(3) was confined to the use of relation back to amend "John Doe" complaints in actions involving government officials. *See Singletary*, 266 F.3d at 201-02, n.5.

errors and pleading errors ultimately attributable to the defendant's insurance provider. Plaintiff Leonard and his minor child, Jade, were hurt in an automobile accident; the other vehicle was owned by Boulanger and driven by Parry. *Id.* at 27. The parties first settled the child's claim by negotiation; by local custom, a "friendly suit" was then filed to obtain court approval of the minor's settlement. *Id.* The settlement agreement and the friendly suit papers were drafted by a lawyer for the insurance carrier. *Id.* Both the settlement agreement and the friendly suit wrongly identified Boulanger, instead of Parry, as the driver of the other vehicle. *Id.* This mistake, emanating from the defense, then perpetuated itself. Plaintiff Leonard filed suit for his own injuries, again naming Boulanger as the driver and sole defendant. *Id.* After the plaintiff served the original complaint and summons, the mix-up was discovered and disclosed by defense counsel; Leonard then amended post-limitations to substitute Parry, the driver, for Boulanger, the owner. *Id.* On these distinctive facts and circumstances, the First Circuit permitted the amended complaint to relate back. The First Circuit remarked that "this blunder alone" caused Leonard to sue the wrong defendant in the first place. *Id.* at 28. The First Circuit remarked that the driver in the accident, Parry, obviously knew from the time of the accident that she had been driving the vehicle. *Id.*

Implicit in *Leonard* is another factor: both Boulanger as the owner and Parry as the driver were presumably covered under the Boulanger auto-insurance policy. There thus existed a shared identity, as co-insureds, between the former defendant and the substituted defendant. Most important, there was plainly no prejudice to the driver, Parry, on practical grounds. She was aware of the accident

from the moment it occurred, and the insurance carrier was on notice from the moment Leonard reported the accident for the purpose of opening negotiations to settle the child's claim. Presented these extraordinary events and equities, which are unlike those in any other Rule 15(c)(3)(B) case reported by any other Circuit Court, the First Circuit allowed Leonard's amended suit to proceed. *Leonard*'s facts, circumstances, and equities differ profoundly from Locklear's tardy claim against Bergman and Luna. Bergman and Luna were not responsible for Locklear's failure to determine his intended defendants, and they were left in the dark about the accident for more than four years, a conspicuous prejudice.

3. Undecided issues below may render an opinion of this Court as to the operation of Rule 15(c)(3)(B) merely advisory.

The procedural posture below also argues against review by this Court. In his appeal by right, Locklear raised a second question: whether Bergman and Luna received timely notice pursuant to Rule 4(m) under the multiple extensions of time to effectuate service upon the original defendant, Hassleholms Mekanisk, and the still-unnamed Bergman and Luna. This question requires an independent judicial construction of Rule 4(m) and its explicating advisory committee notes to determine the Rule's scope.[4] The Fourth Circuit did not reach this matter. Petition App. at 7a. Similarly, there remains pending in the district court Bergman and Luna's motion to dismiss for lack of personal jurisdiction. The jurisdictional motion

[4] Any construction of Rule 4(m) will also require consideration of Rule 4(f) pertaining to service in a foreign country.

to dismiss examining the provisions of the Maryland long-arm statute and related case law, asserted that Bergman and Luna are Swedish corporations that have no presence in Maryland, do not conduct business in Maryland directly or by an agent, have not otherwise purposely availed themselves of the protections or privileges under Maryland law, and have no transactional nexus to the factory machine's acquisition by its Maryland owner. The trial court did not reach the jurisdictional question. Petition App. at 16a. Accordingly, it is entirely possible that, in the event of a remand to either the Circuit Court or ultimately the district court, the case may be decided on other grounds. Such an eventuality would render an opinion of this Court about the operation of Rule 15(c)(3)(B) merely advisory, which this Court has long disapproved. *Alabama v. Shelton*, 535 U.S. 654, 676 (2002); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998).

4. Maryland's three-year statute of limitations conferred adequate time for determination of the proper defendant.

Locklear is decidedly wrong in arguing (Petition at 23-24) that he was put out of court on "a mere technicality" resulting from "gamesmanship." Maryland's general three-year statute of limitations is generous. It is a fundamental part of the State's law. The statute of limitations reflects the legislative judgment of what is deemed an adequate period of time in which a person of ordinary diligence should bring his action. *Walko Corp. v. Burger Chef*, 378 A.2d 1100, 1104 (Md. 1977). The primary consideration underlying the statute of limitations is one of fairness to defendants – that they ought not to be called on to resist a claim when evidence has been lost, memories have faded, and witnesses have disappeared. *Feldman v. Granger*, 257

A.2d 421, 426 (Md. 1969); *Doughty v. Prettyman*, 148 A.2d 438, 443 (Md. 1959). As the D.C. Circuit remarked,

> In the adversarial system of litigation the plaintiff is responsible for determining who is liable for [his] injury and for doing so before the statute of limitations runs out; if [he] later discovers another possible defendant, [he] may not, merely by invoking Rule 15(c), avoid the consequences of [his] earlier oversight.

Rendall-Speranza v. Nassim, 107 F.3d 913, 918 (D.C. Cir. 1997). Here Locklear slept on his rights until, and indeed past, the eleventh hour. His failure to comply with the statute of limitations is a far cry from the technical pleading mishap in *Foman v. Davis*, 371 U.S. 178 (1962), on which he relies, where the plaintiff's second notice of appeal failed to specify that the appeal was taken from the judgment sought to be vacated as well as the denial of her motions to vacate the judgment and to amend her complaint.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

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In The

Supreme Court of the United States

AARON LOCKLEAR,

Petitioner,

v.

BERGMAN & BEVING AB; LUNA AB,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT REGARDING RESPONDENT'S COUNTER-STATEMENT OF THE QUESTION PRESENTED

Respondent's counter-statement of the question presented should be ignored by this Court because it is not only a question rather than a statement, but also incorrectly discusses the facts of the case, rather than the actual split among the Courts of Appeals regarding the interpretation of Fed. R. Civ. P. 15(c)(3)(B), which is the actual issue.

INTRODUCTION

Respondent's Brief in Opposition to the Petition for Writ of Certiorari has erroneously and contrary to the rules of this Court, argued the merits of the case, rather than the issue of national importance regarding the conflicting interpretations regarding Fed. R. Civ. P. 15(c)(3)(B) among the Courts of Appeals. The purpose of the Petition for a Writ of Certiorari is to argue that an issue, and not the merits of the case, are worthy of review by this Court. Accordingly, this Court should ignore Respondent's arguments regarding the merits of the case.

1. The assertion that there is an irreconcible split among the Courts of Appeals is correct.

The split among the Courts of Appeals mentioned in the Petition is correct and Respondent has failed to prove that the Courts of Appeals are in agreement as to the correct interpretation of Fed. R. Civ. P. 15(c)(3)(B). Instead, Respondent has mistakenly argued the merits of the case and how they are distinguishable from other cases. The

issue is not how the facts of this case are distinguishable from other cases, but rather that the Courts of Appeals have ruled in opposite directions regarding a Federal Rule of Civil Procedure. The contents of the Petition clearly prove that there is an irreconcible split among the Courts of Appeals and that the only resolution is a decision by this Court.

2. Respondent's assertion that the Fourth Circuit's decision was correct should be ignored by this Court.

Respondent attempts to argue that the Fourth Circuit was correct in its decision, how Respondent has mistakenly argued the merits of the case, not the issue. Respondent has failed to argue why the Fourth Circuit's decision should divert from the plain meaning of mistake, as defined in *Leonard v. Parry*. See *Leonard v. Parry*, 219 F. 3d 25 (1st Cir. 2000). Further, Respondent offers no arguments as to why the Fourth Circuit was correct in its interpretation of Rule 15(c)(3)(B), but rather re-states dicta from the opinion, resulting in a weak and paltry argument.

3. Respondent has incorrectly stated the law in its assertion that a ruling by this Court would be an advisory opinion.

For there to be an advisory opinion, the issue is whether this Court would be ruling on an issue that *hasn't* presented a case or controversy under Article III of the United States Constitution. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41, 81 L. Ed. 617, 57 S. Ct. 461 (1937). Clearly, conflicting interpretations of Rule

15(c)(3)(B) among the Courts of Appeals and the ruling by the Fourth Circuit in this case have created a case or controversy and Petitioner has been adversely affected by the Fourth Circuit's ruling regarding the interpretation of Rule 15(c)(3)(B). Respondent erroneously argues that since *other issues* regarding personal jurisdiction and Rule 4(m) have been undecided, that a ruling by this Court would be an advisory opinion. This argument is a clear misunderstanding of the law, since this Court would not be ruling on the undecided issues that Respondent has claimed would render an opinion by this Court an advisory opinion. Respondent should have argued that there is no case or controversy regarding the interpretation of Rule 15(c)(3)(B), which would be the only basis for supporting the notion that a ruling by this Court would be an advisory opinion.

4. Respondent's assertion that Maryland's three-year statute of limitations was adequate is inapplicable to the issue and should be ignored.

Respondent attempts to argue the merits of the case, however, the merits of the case are irrelevant when deciding if there is an irreconcible issue of national importance regarding Rule 15(c)(3)(B). Whether the time limit of the statute of limitations was adequate is irrelevant because the relevant issue is whether the "lack of knowledge of the identity of the proper party" is a mistake under Rule 15(c)(3)(B).

Respondent has clearly avoided analyzing the true issue regarding Rule 15(c)(3)(B) and has instead attempted to prematurely argue the merits of the case. Respondent has failed to prove why courts should divert from the plain meaning of Rule 15(c)(3)(B), as stated in

Leonard v. Parry. See *Leonard*. Petitioner re-asserts that contents of the Petition are worthy of this Court granting certiorari to resolve a genuine issue of national importance regarding Rule 15(c)(3)(B).

CONCLUSION

This Court should grant the petition for certiorari.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner, Aaron Locklear, respectfully requests the Court for rehearing of its denial of his petition for certiorari issued on February 20, 2007. The grounds for this petition that there are substantial grounds not presented in the petition and that there are substantial intervening circumstances of substantial effect which warrant rehearing.

ARGUMENT

1. Lower courts have recently acknowledged that there is a split among the circuits as to whether "lack of knowledge" is a mistake under Federal Rule of Civil Procedure 15(c)(3)(B).

In *Miller v. Holzmann*, 2006 U.S. Dist. LEXIS 93414 (D.D.C. Dec. 28, 2006), a case that was decided one month after the petition for a writ of certiorari was filed to this Court in this case, the District Court of the District of Columbia found that "lack of knowledge" was not a mistake under Fed. R. Civ. P. 15(c)(3)(B) (hereafter known as "Rule"), but noted in its opinion that the Third Circuit holds that "lack of knowledge" is a mistake under Rule 15(c)(3)(B). *Miller v. Holzmann*, 2006 U.S. Dist. LEXIS 93414, 27 (D.D.C. Dec. 28, 2006). *Miller*, decided one month after the petition for a writ of certiorari was filed to this Court in this case, represents important and substantial intervening circumstances that warrants rehearing in this case because *Miller* represents an ongoing conflict among the circuits as to whether "lack of knowledge" is a mistake under Rule 15(c)(3)(B), and clearly demonstrates that the split among the circuits will continue.

In *Arthur v. Maersk, Inc.*, the most recent case to come out of the Third Circuit Court of Appeals involving the "lack of knowledge" issue under Rule 15(c)(3)(B), the Third Circuit upheld its view that "lack of knowledge" was a mistake under Rule 15(c)(3)(B). *Arthur v. Maersk, Inc.*, 434 F. 3d 196 (3rd Cir. 2006). The Third Circuit adopted the view set forth in *Leonard v. Parry* in the First Circuit, that "lack of knowledge" was a mistake under Rule 15(c)(3)(B) because *Webster's Third New International Dictionary* 1146 (1981), defines mistake as "a wrong...statement proceeding from faulty judgment, inadequate knowledge, or inattention". *Id* at 208, see also *Leonard v. Parry*, 219 F. 3d 25, 27 (1st Cir. 2000). The court also noted that in *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 123, 110 S. Ct. 456, 107 L. Ed. 2d 438 (1989) that this Court held that the Federal Rules of Civil Procedure are given their plain meaning. *Id.* The court also notes the advisory committee's notes to the 1966 amendment of Rule 15, which state that "mistake" is not limited to a misnomer or misidentification. *Id.* The court also noted that *Leonard v. Parry*, 219 F. 3d 25, 27 (1st Cir. 2000) and *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F. 3d 1498, 1504 (9th Cir. 1994) also held that a "mistake" under Rule 15(c)(3)(B) is not limited to a misnomer or misidentification. *See id.* In the dissenting opinion of *Arthur*, Judge Van Antwerpen acknowledged that there was a split amongst the circuits as to whether "lack of knowledge" was a mistake under Rule 15(c)(3)(B). *See id* at 210-12.

2. When lower courts are split as to whether "lack of knowledge" is a mistake under rule 15(c)(3)(B), serious separation of powers issues arise that need to be resolved.

Rule 15(c)(3)(B) does not need to be changed, since some circuits have been able to properly interpret the Rule through proper analysis of the advisory committee's notes to the amendments to Rule 15. However, other circuits, including the Fourth Circuit, need to be corrected in their interpretation of Rule 15(c)(3)(B), because the primary purpose of the Federal Rules of Civil Procedure was to have rules that applied uniformly throughout federal courts. If lower courts continue to rule in opposite directions regarding a Federal Rule of Civil Procedure, it consequently renders the Federal Rules of Civil Procedure meaningless, since the lower courts would have carte blanche to apply the Federal Rules of Civil Procedure in any manner they desire. Such a split among the circuits in applying a Federal Rule of Civil Procedure raises serious separation of powers issues because the lower courts do not have the power to change or modify the Federal Rules of Civil Procedure. *See* 28 U.S.C. §§2071-2077. The Fourth Circuit, along with other circuits that hold that "lack of knowledge" of the proper defendant is not a mistake under Rule 15(c)(3)(B), have changed Rule 15(c)(3)(B) in their jurisdiction, something those courts are without power to do. *See id.*

3. The advisory committee has clearly intended that "lack of knowledge" is to be construed as a mistake under rule 15(c)(3)(B) in the 1966 amendment to rule 15.

In the advisory committee's note of the 1966 amendment to Rule 15, the committee noted that naming a non-existent federal agency or a retired officer are mistakes covered under Rule 15(c)(3) even though reasonable diligence will almost always prevent these mistakes from occurring. See *Lacedra v. Donald W. Hyatt Det. Facililty*, 334 F. Supp. 2d 114 (D.R.I. 2004) (citing the advisory committee's notes to the 1966 amendment of Rule 15). The advisory committee was clear that under Rule 15(c)(3), "lack of knowledge of the proper party" is to be construed as a mistake when they stated that suing a non-existent federal agency is a mistake, since the plaintiff would not know the identity of the proper party if the plaintiff was naming a non-existent defendant in its original complaint.

The notes of the advisory committee in the 1966 amendment to Rule 15 were also noted by this Court in *Schiavone v. Fortune*, where Justice Stevens and Justice White noted in their dissenting opinion:

> "The principal purpose of Rule 15(c) is enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice his adversary in any way...Moreover, the specific liberalizing purpose of the 1966 amendment to the Rule is frustrated if the added language is construed to cut back on the number of cases in which relation back is permitted...A group of contrary cases in which plaintiffs had mistakenly sued the wrong Government

> official and not been allowed to amend their complaints after the statute had run give rise to criticism of the Rule and the addition of the second and third sentences of its present text. Ironically, it is the language added by the amendment in 1966 to broaden the category of harmless pleading errors which the Court construes today to narrow that category. "

Schiavone v. Fortune, 477 U.S. 21, 38-39 (1986) (Justice Stevens and Justice White dissenting).

Although *Schiavone* did not address "lack of knowledge" as a mistake, and rather dealt with the issue of notice under Rule 15(c), it is clear that this Court has recognized that the advisory committee's notes to the 1966 amendment of Rule 15 are to be liberalizing to plaintiffs who seek to correct pleading errors and that the purpose was not to cut back on the number of cases where relation back is permitted.

4. The advisory committee's notes to the 1991 amendment of rule 15 merely give examples of mistake under rule 15(c)(3)(B), and do not limit the types of mistake under rule 15(c)(3)(B).

The Fourth Circuit and other circuits that join in its view that "lack of knowledge" is not a mistake under Rule 15(c)(3)(B), have failed to carefully read the advisory committee's notes to the 1991 Amendment of Rule 15 and the advisory committee's notes to the 1966 Amendment of Rule 15. The Fourth Circuit in this case states that a mistake falls under Rule 15(c)(3) where it is to "correct a formal defect such as a misnomer or misidentification". *See Locklear v.*

Bergman & Beving, AB, 457 F. 3d 363, 366 (4th Cir. 2006). This phrase is a direct quote of the advisory committee's notes to the 1991 Amendment to Rule 15. *See* Fed. R. Civ. P. 15 (advisory committee's notes to the 1991 Amendment).

The error that the Fourth Circuit made in this case was that the language of the advisory committee's notes lists mistakes "such as" a misnomer or misidentification. The term "such as" does not limit what is to be construed as a mistake under Rule 15(c)(3), but rather gives examples of mistakes under the Rule. The Federal Rules of Civil Procedure are carefully drafted, and the language of Rule 15(c)(3) clearly does not limit the types of mistake. The advisory committee's notes to the 1966 Amendment to Rule 15 clearly state that naming a non-existent defendant in the original complaint is a mistake under Rule 15(c)(3). *See* Fed. R. Civ. P. 15 (advisory committee's notes to the 1966 amendment). Although the advisory committee's notes state that a mistake "includes" a misnomer or misidentification, it does not state that a mistake is limited to such scenarios. *Id.*

There have not been any changes to Rule 15, nor have their been any notes by the advisory committee following the 1966 Amendment to Rule 15 that change this assertion made by the advisory committee in its notes to the 1966 Amendment to Rule 15. It is also clear that when a plaintiff names a non-existent defendant in the original complaint, such as the Petitioner and Plaintiff, Aaron Locklear, did in this case by naming "Hasselholms Mekansika, AB" (a non-existent corporation whose successor is Berman & Beving, AB) in his original complaint as the defendant, that the plaintiff lacks the knowledge of the identity of the proper party to be named in the complaint as the defendant, and thus

lack of knowledge is a mistake under Rule 15(c)(3)(B). Since it is clear that "lack of knowledge" is a mistake under Rule 15(c)(3)(B), and that several, but not all circuits, including the Fourth Circuit in this case, have continued for a number of years to incorrectly apply Rule 15(c)(3)(B) and have instead change the Rule in their jurisdiction, this Court must resolve this issue and put an end to the erroneous application of Rule 15(c)(3)(B) by several, but not all circuits.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully requests the Court to grant the petition for rehearing.

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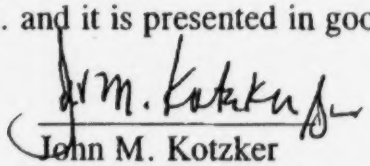
March 15, 2007

CERTIFICATION

The foregoing is restricted to the grounds specified in 44.2 S. Ct. R. and it is presented in good faith and not for delay.



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